92-1598

No._____

SUPREME COURT, U.S.
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IN THE
Supreme Court of the United States
October Term, 1992

THOMAS W. CURLEY,
Petitioner,

-against-

CONSOLIDATED RAIL CORPORATION and
EXCELSIOR TRUCK LEASING COMPANY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE NEW YORK COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Assuming arguendo that the statement in Atchison, Topeka & Santa Fe R. Co. v. Toops, 281 U.S. 351, at 354-355 (1930), that in a FELA case the jury "may not be permitted to speculate as to [the cause of the plaintiff's injury] and the case must be withdrawn from its consideration unless there is evidence from which the inference may reasonably be drawn that the injury suffered was caused by the negligent act of the employer" was ever a totally accurate statement of FELA causation law, in light of this Court's post-Toops decisions dealing with sufficiency of evidence and the role of the jury in FELA cases, see, e.g., Gallick v. Baltimore & Ohio R. Co., 372 U.S. 108 (1963) (collecting and discussing cases), is the portion of this statement in Toops relating to "speculation" still good law?

2. In this case did the New York Court of Appeals effectively defy the doctrine of Federal Supremacy (see United States Constitution, Article VI, Clause 2, and Article III, Section 1) when it held, purporting to rely on Toops, that the jury verdict in the petitioner's favor was required to be vacated and his complaint dismissed, based on the stated ground that the jury's finding that petitioner's injury had been caused by the respondent railroad's negligence had to have been based on "total speculation," where, in so holding, that court apparently deliberately ignored this Court's numerous post-Toops decisions which appear plainly to establish that the evidence on causation in this case was in fact entirely sufficient?

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

OPINIONS BELOW

The decision and order of the New York Court of Appeals here sought to be reviewed is reported at 80 N.Y.2d 746, ____ N.Y.S.2d ____, ____ N.E.2d ____. The opinion of the Appellate Division of the New York Supreme Court is reported at 178

A.D.2d 318, 578 N.Y.S.2d 536. A prior Appellate Division order is reported at 155 A.D.2d 283, 547 N.Y.S.2d 552.

JURISDICTION

The order here sought to be reviewed was entered on December 21, 1992. By order entered February 25, 1993, the Court of Appeals denied petitioner's timely motion for reargument. This petition is being filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution:

Article III, Section 1:

> The judicial Power of the United States, shall be vested in one supreme Court . . . .

Article VI, Clause 2:

> This Constitution, and the Laws of the United States which shall be

> made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . . .

45 U.S.C. Section 51:

> Every common carrier by railroad while engaging in commerce . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier . . . .

STATEMENT OF THE CASE

In this action the petitioner seeks to recover damages for serious and permanently disabling back injuries he claims to have suffered on the evening of March 6, 1984, when, while he was employed by the respondent Consolidated Rail Corporation ("Conrail") as a railroad police officer and was driving a Conrail police car, the car came to a sudden and unexpected stop, causing him

to be violently thrown forward and across the car seat.

The car was a 1981 Ford, owned by respondent Excelsior Truck Leasing Company ("Excelsior"), which had been leased to Conrail for a two year period beginning in July, 1981. As of the date of petitioner's claimed injury, which was approximately eight months beyond the expiration of the original two year lease term, in addition to this car having been kept in service longer than was Conrail's usual practice, it had been driven at least 164,000 miles and more likely in excess of 264,000 miles. It was in constant need of repairs.

While he had been on patrol on the evenings immediately preceding this incident, petitioner had noticed that the car was making strange noises, seemingly coming from the area of the rear axle,

which he had reported on the daily vehicle record. He asked the day officer to take the car into the shop to have it checked, but the day officer refused.

Another officer who used this car testified that a year earlier he had experienced a problem with the car's suddenly losing power and stopping and that in the period just prior to the petitioner's accident he had noticed a recurrence of this problem. On the morning of March 5, 1984, the day before the petitioner's accident, this officer had complained of the way the car was acting to their supervising captain. The captain's response was, like the response to this officer's complaints of a year earlier, that the officers had to work with the equipment they were given.

On its case Conrail called both the service manager of the Ford dealership

where the car was taken the day after this incident and a Ford Motor Company engineer to establish that the car could not have stopped in the way that the petitioner claimed it had.

Despite their direct testimony supportive of Conrail's position, on cross-examination both witnesses made critical concessions indicating that this accident could well have occurred as petitioner claimed. Thus, the service manager admitted that the sudden stopping of the car could have been caused by pieces breaking off and jamming in the differential or in the transmission, or the emergency brake having accidentally engaged. He admitted that he had not inspected the transmission or the emergency brake cable. Moreover, his testimony as to the procedures followed when the differential was inspected

indicated that he had not been present when the differential was being taken apart and drained, and thus he could not testify as to what damaged parts might have been observed when this work was done.

The Ford engineer testified that 150,000 miles on a police car would be harder miles than normal driving and that such use would cause parts to wear out faster. He also testified that between the rear axle assembly, the braking system, the drive shaft and the transmission there would be "hundreds of parts" which would suffer wear through operation, that at 150,000 miles there would be substantial wear, that 250,000 miles would be "very high," and that between 150,000 and 250,000 miles parts would constantly be getting worn out and breaking. He specifically conceded that

if a part had broken off and jammed in the gears of the differential, this could have caused the car to act as petitioner claimed it had.

There was also evidence that Conrail did not have any policy with respect to retiring from service cars which had excessive mileage or were no longer fit for police use and that petitioner's supervisor had been negligent with respect to monitoring the condition of the cars being used by his men.

At trial petitioner conceded that he could not identify the precise cause of the car's having acted as he claimed it had. Nonetheless, he urged, it was fair to infer that this had been caused or contributed to by Conrail's negligence in, inter alia, keeping this car in service for the extremely long period it did and/or its failures to check out the

complaints which had been made just before his accident.

The jury was instructed, in accordance with this Court's decision in Rogers v. Missouri, Pac. R. Co., 352 U.S. 500, at 506, reh. denied, 353 U.S. 943 (1957), that, if it found that Conrail had been negligent, it was sufficient to allow it to find that such negligence had caused petitioner's injury if it found that this negligence played any part, even the slightest, in producing plaintiff's injury (Trial Tr. 1306-07). The jury found that Conrail had been negligent and that its negligence had caused petitioner's injury. It found that petitioner had not been negligent. It further found that Excelsior had not been negligent and had not breached its contract with Conrail. The trial court entered judgment against

Conrail and in favor of the petitioner (and Excelsior) based on this verdict.

On appeal to the Appellate Division, as against petitioner Conrail limited its appeal to its contention that, based on various claimed trial errors and the "weight of the evidence," it was entitled to a new trial. It did not urge that petitioner's complaint must be dismissed for insufficient evidence. However, the Appellate Division majority sua sponte determined that the evidence on causation was insufficient, and on this ground it ordered the complaint dismissed. As support for this holding it cited this Court's decision in Atchison, Topeka & Santa Fe Ry. Co. v. Toops, 281 U.S. 351 (1930), where this Court had stated, using very broad language, that a FELA jury "may not be permitted to speculate" as to the causal connection between the

employer's negligence and a plaintiff's injury. See 281 U.S., at 354-355.

In it opinion the Appellate Division was somewhat ambiguous as to whether its holding was in fact based on its cited concern with "speculation" or, instead, on its evident doubt as to petitioner's credibility concerning how his injury had occurred. Thus, at one point the court appears to have based its holding on what it perceived as inconsistencies in petitioner's testimony (see A29). On the other hand, the court's opinion may also be read as having been based on the court's having accepted Conrail's argument that petitioner was required to establish the precise mechanical condition or defect which had caused the car to malfunction (see A29-30; see also Conrail's Appellate Division Appellant's Brief at pp. 6 and 12-14).

The dissenting justice in the Appellate Division was of the view that petitioner had made out a prima facie case. He also suggested that the majority's decision was based upon a "negative appraisal of the weight of the evidence" (A35).

In the Court of Appeals, petitioner urged that the Appellate Division's reliance upon Toops' statement concerning speculation had been misplaced in light of this Court's later decisions in cases such as Gallick v. Baltimore & Ohio R. Co., 372 U.S. 108 (1963), Webb v. Illinois Central R. Co., 352 U.S. 512 (1957), Schulz v. Pennsylvania R. Co., 350 U.S. 523 (1956), and Lavender v. Kurn, 327 U.S. 645 (1946), all of which had specifically recognized that some measure of speculation must be allowed to a jury in cases of this type and all of

which, petitioner urged, squarely supported his contention that in this case the evidence on causation was entirely sufficient. Moreover, he urged, the critical issue in this case was not speculation; rather, it was whether, under this Court's decision in Basham v. Pennsylvania R. Co., 372 U.S. 699 (1963), this jury was entitled to credit petitioner's account of how his injuries had occurred.

He also urged that even under New York's generally more restrictive requirements with respect to establishing causation in a negligence case, as well as the approach currently taken by most American courts, the evidence on this issue in this case was in fact sufficient. See, e.g., Feblot v. New York Times Co., 32 N.Y.2d 486, 494-495, 346 N.Y.S.2d 256, 299 N.E.2d 672 (1973)

(evidence sufficient if jury believed plaintiff's account of how she was injured); id., 32 N.Y., at 498-499 (Breitel, J., concurring) (plaintiff not required to establish "the precise cause" of malfunction); Rogers v. Dorchester Associates, 32 N.Y.2d 553, 559-560, 347 N.Y.S.2d 22, 300 N.E.2d 403 (1973); 4 F.V. Harper, F. James & O. Gray, The Law of Torts (2d ed. 1986), Section 20.2.

In the Court of Appeals, the dissenting judge, Judge Bellacosa, agreed with petitioner that under this Court's post-Toops precedents it had to be held that the evidence on causation in this case was sufficient (see, e.g., A12-13). He further indicated that he agreed with the petitioner that, even under the relatively more demanding requirements of New York law, this evidence was sufficient to sustain this jury verdict.

Judge Bellacosa pointed out that petitioner's case was stronger than was the petitioner's case in Basham, where this Court had reversed the Court of Appeals and held that the New York courts had improperly invaded the province of the jury in setting aside that FELA jury verdict (A16-17). He also suggested that Toops had to be read in light of this Court's subsequent FELA causation decisions, such as Lavender v. Kurn, with the rule to be distilled from these cases being that a FELA jury verdict could not be based entirely on speculation, but that some speculation was allowable when "'the evidence is such that fair minded [individuals] may draw different inferences'" (A13, quoting Lavender v. Kurn, 327 U.S., at 653; material in brackets added by Judge Bellacosa).

Judge Bellacosa noted that under this Court's controlling precedents special deference was required to be accorded to jury verdicts in FELA cases, and that this also required the sustaining of this jury verdict (A17-19).

On the other hand, the Court of Appeals majority, while it quoted this Court's statement of the standard of proof of causation required in FELA actions as set forth in Rogers and reaffirmed in Atchison, Topeka & Santa Fe R. Co. v. Buell, 480 U.S. 557 (1987) (A2-3), simply ignored this Court's decisions in Basham, Gallick, Schulz, and Lavender v. Kurn. Indeed, it did not even cite any of those decisions. Instead, relying solely upon Toops, it held that the petitioner's evidence was "insufficient as a matter of law, without total speculation . . . to permit the

inference that any negligent act or omission on Conrail's part caused his injuries" (A3).

As was the Appellate Division's opinion, the Court of Appeals' majority opinion was vague as to the actual basis for the court's holding. Thus, while the court stated that this verdict must have been based on "total speculation," it did not explain what it meant by this so conclusory statement. Again, it made no attempt to reconcile its holding and the facts of this case with Basham or the other post-Toops decisions relied upon by the petitioner and the dissenting judge.

In his dissent, Judge Bellacosa characterized what had occurred in the New York appellate courts in this case as an "evident disregard . . . of the controlling Federal standards as they should be applied to this case" (A12).

REASONS FOR GRANTING THE WRIT

1. THE COURT OF APPEALS' DECISION IN THIS CASE IS NOT REQUIRED BY THIS COURT'S DECISION IN TOOPS AND IS SQUARELY INCONSISTENT WITH THIS COURT'S POST-TOOPS FELA CAUSATION PRECEDENTS.

In Toops this Court's so broad statement concerning it not being permissible for a FELA finding of causation to be based on jury speculation was in fact unnecessary to that decision. Toops was a death case, where there were no eye-witnesses, and there was no evidence in that case that the employer had in any way been negligent, much less that any such never-established negligence might have caused the decedent's death. Rather, negligence was simply assumed arguendo. See 281 U.S., at 355. In short, this statement here so relied upon by the New York appellate courts may fairly be considered to have been nothing more than dicta, albeit Supreme Court dicta.

Compare Kastigar v. United States, 406 U.S. 441, 454-455 (1972), reh. denied, 408 U.S. 931 (1972) (broad language unnecessary to court's decision cannot be considered binding authority).

Moreover, in considering what, if any, precedential effect this statement in Toops is or may have been entitled to, it is necessary to consider the entire sentence in which this statement appears, wherein this Court critically qualified this otherwise so broad statement, viz: "The jury may not be permitted to speculate as to [the] cause [of the injury] and the case must be withdrawn from its consideration unless there is evidence from which the inference may reasonably be drawn that the injury suffered was caused by the negligent act of the employer" (281 U.S. at 354-55; emphasis added).

Also, this statement in Toops has to be considered in light of this Court's decision in New York Central R. Co. v. Marcone, 281 U.S. 345 (1930), decided the same day as Toops, and likewise authored by Justice Stone. In Marcone there were no eyewitnesses to the accident which caused that railroad worker's death, and, clearly, in that case a large measure of speculation must have been required for that jury to have concluded that the decedent's death had been caused by the railroad's negligence. Yet, this Court unanimously held that there was in that case sufficient evidence for that jury to have concluded that the decedent's death had been caused by his employer's negligence. See 281 U.S., at 349-350.

Even more to the point, even assuming that this statement in Toops ever was entitled to be considered as a

binding precedent of this Court, it plainly no longer can be accorded that status. It has in fact, if not by name, been effectively overruled by this Court's post-Toops decisions in cases such as Gallick, Webb, Schulz, and Lavender v. Kurn, all specifically recognizing that it is no proper objection to a FELA jury's finding of causation that such finding may have been based in some measure on speculation, all simply ignoring this language in Toops, and all standing squarely for the proposition that the evidence in this case was as a matter of law entirely sufficient. See, e.g., Gallick, 372 U.S., at 113-117, reviewing and reaffirming this Court's post-Toops causation and sufficiency of evidence precedents, and never once even mentioning Toops. See also Webb, 352 U.S., at 512 n. 6.

Moreover, it bears noting that the last time Toops was cited by this Court was in 1944, in Tennant v. Peoria & P.U.R. Co., 321 U.S. 29, at 33, reh. denied 321 U.S. 802, where this Court had rejected the employer's claim that the evidence as to causation was insufficient. Also, Toops must today be considered in light of what this Court said in Gallick, Rogers, Schulz, Lavender v. Kurn, and Tennant as to the deference which must be accorded to the role of the jury in FELA cases. In addition, under this Court's decision in Basham it is plain that petitioner was not required to establish the precise mechanical defect or condition that caused this car to malfunction.

Finally, as Judge Bellacosa recognized, properly analyzed, this case does not turn on excessive jury specu-

lation. Rather, what it turns on is solely whether this jury was entitled to credit the petitioner's testimony concerning how his injury had occurred, which under Basham it most assuredly was. See 372 U.S., at 700-701. See also Davis v. Baltimore & Ohio R. Co., 379 U.S. 671 (1965); cf. Edmonson v. Leesville Concrete Co., ___ U.S. ___ , ____, 114 L.Ed.2d 660, 676, 111 S.Ct. 2077, 2085 (1991) (citing Basham for proposition that the jury is "the principal fact finder, charged with weighing the evidence, judging the credibility of witnesses, and reaching a verdict").

Of course, with this statement in Toops never having been specifically repudiated by this Court, it was required to be treated with at least some deference by the New York courts. See, e.g., Rodriquez de Quijas v. Shearson/American

Express, Inc., 490 U.S. 477, 484 (1989) (lower courts required to follow "directly controlling" -- albeit undermined -- Supreme Court precedent); id., at 486-87 (Stevens, J., dissenting). See also Howlett v. Rose, 496 U.S. 356, 376 (1990) (noting that a state court entertaining an action under 42 U.S.C. Section 1983 must adhere to this Court's interpretation of that statute).

But, plainly, it is submitted, this language from Toops here so relied upon by the New York appellate courts cannot properly be considered a "directly controlling" precedent dispositive of this case. That would be to altogether distort and pervert the doctrine of stare decisis and the "principle of obedience" (see 1B Moore's Federal Practice, par. 0.402[1], p. 12 n.15).

What has occurred here is not "obedience" to the principles of stare decisis and federal supremacy. Rather, it is, in reality, defiance of those principles. It ignores the cardinal principle of stare decisis that it is this Court's most recent decisions which must be accepted as controlling. It ignores what were the actual facts and the full language of Toops, as well as this Court's contemporaneous decision in New York Central v. Marcone. It renders meaningless this Court's repeated admonitions in cases such as Tennant, Lavender v. Kurn, Schulz, Gallick and Basham that the courts may not invade the province of the jury in FELA cases, but, instead, must allow the jury to determine credibility, weigh the evidence and decide the facts. And, of course, it ignores this Court's express pronounce-

ments that it is no proper objection to a jury finding of causation in a FELA case that such finding may in some measure have been based on speculation.

In short, this case is not controlled by Toops. And, to the extent that in this case the New York appellate courts may either have been misled in relying upon this language from Toops or have attempted to avoid the effect of this Court's later, and here controlling, decisions by relying on this long-ignored and effectively long-since overruled statement, this can only serve to underscore the need for this Court to grant the writ of certiorari in this case.

In this case, Conrail's negligence was more than amply established, and no excessive or impermissible speculation was required for this jury to have concluded that that negligence caused or

contributed to the petitioner's injury. Compare, for example, Marcone, 281 U.S. 345. All that this required was that the jury believe petitioner's account of how he was injured. Basham, 372 U.S. 699.

2. THE WRIT OF CERTIORARI SHOULD BE ISSUED TO VINDICATE AND PROTECT THE SOLE AND SUPREME AUTHORITY OF THIS COURT TO DEFINITIVELY CONSTRUE THIS STATUTE.

In this case the Court of Appeals majority went through the ritual of rendering homage to this Court's authority to definitively interpret this federal statute by citing and professing to be following this Court's decisions in Rogers and Buell, as well as Toops. However, so profound was that court's silence with respect to this Court's post-Toops precedents speaking directly to the issue of the sufficiency of evidence of causation presented by this case that the conclusion is inescapable

that in fact what occurred in this case was, as Judge Bellacosa suggested, the deliberate denial of a federal right, in "evident disregard" of this Court's controlling precedents (A12), under the cover, the mere pretext, of following Toops. Compare Howlett v. Rose, 496 U.S., at 366, where this Court pointed out, in discussing the issue of "adequate state ground" for a state court's not enforcing a federal right, that it is within the province of this Court "to inquire not only whether the [federal] right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward non-federal grounds of decision that were without any fair and substantial support."

Here, there is presented the very same cause for concern that a pretextual

ground of decision may have been employed by a state court in order to defeat federal rights, with here the only difference from the situation described in Howlett being that here what was done was to put forward a purported federal ground of decision that was "without any fair and substantial support." Id.

Moreover, what this case presents, or at least seems clearly to present, is the plainly intolerable spectacle of the New York Court of Appeals not merely defying this Court's authority, but also apparently mocking that authority -- by its purporting to follow this Court's precedents, while at the same time it trifled with its obligation to carefully examine and take seriously all of this Court's relevant precedents and to undertake responsibly to determine which of those precedents must be followed.

The New York Court of Appeals knows full well what the doctrine of stare decisis requires by way of carefully examining precedents. See, e.g., Flanagan v. Prudential-Bache Securities, Inc., 67 N.Y.2d 500, 504 N.Y.S.2d 82, 495 N.E.2d 345, cert. denied, 479 U.S. 931 (1986); People v. Hobson, 39 N.Y. 2d 479, 384 N.Y.S.2d 419, 348 N.E.2d 894 (1976). This is something which that court knows it must do in a case controlled by federal law. See, e.g., Singer v. Jefferies & Co., 78 N.Y.2d 76, 571 N.Y.S.2d 680, 575 N.E.2d 98 (1991). Yet, in this case the Court of Appeals majority did not do what it was required to do by way of following this Court's controlling precedents. Instead, here, it plainly appears, it chose to disregard this Court's supreme authority. Compare General Atomic Co. v. Felter, 436 U.S. 493 (1978).

3. THE WRIT OF CERTIORARI SHOULD BE GRANTED IN THIS CASE IN ORDER TO GIVE EFFECT TO THE INTENT OF CONGRESS AS THAT INTENT HAS BEEN EXPRESSED IN THE FEDERAL EMPLOYERS' LIABILITY ACT AND TO DO JUSTICE TO THE PETITIONER.

This Court's post-Toops causation and sufficiency of evidence precedents, as those precedents have evolved through decisions such as Lavender v. Kurn, Schulz, Rogers, Gallick, and Basham, are all supported by both the broad and plain language of this statute and its legislative history. See Rogers, 352 U.S., at 506-507. These controlling FELA precedents reflect not merely this statute's broad language, but also its remedial purpose. See Buell, 480 U.S., at 561-562. In addition, they represent what this Court has clearly and repeatedly stated Congress intended in enacting this legislation. This construction of this statute has for decades now, in case

after case, been acquiesced in by Congress as representing how this statute should be construed. Accordingly, it must be accepted as representing not merely this Court's view of the original intent of Congress, but also the continuing will of Congress. See Hilton v. South Carolina Pub. Ry. Commm., 502 U.S. ___, ___, 116 L.Ed.2d 560, 569-570, 112 S.Ct. 560 (1991); Illinois Brick Co. v. Illinois, 431 U.S. 720, 736, reh. denied 434 U.S. 881 (1977); Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406-408 (1932) (Brandeis, J., concurring).

In the face of that clear intent of Congress, the task of the courts is to give effect to that intent. See, e.g., Negonsott v. Samuels, ___ U.S. ___, ___, ___ L.Ed.2d ___, ___, 113 S.Ct. 1119, 1122-1123 (1993); Griffin v. Oceanic

Contractors, Inc., 458 U.S. 564, 571 (1982).

What the New York appellate courts have done in this case flies squarely in the face of that intent. It is an affront not only to this Court, but also to the Congress. It is, by virtue of this, a plain violation of the principle of Federal Supremacy. See U. S. Const., Art. VI, Clause 2; Howlett v. Rose, 496 U.S. 356; Arnold v. Panhandle & Santa Fe R. Co., 353 U.S. 360 (1957); Testa v. Katt, 330 U.S. 386 (1947); Baltimore & Ohio R. Co. v. Kepner, 314 U.S. 44 (1941); Mondou v. New York, N.H.& H.R. Co., 223 U.S. 1 (1912). Cf. Hilton v. South Carolina Pub. Ry. Comm., 502 U.S., at ___, 116 L.Ed.2d, at 572, 112 S.Ct., at 566.

It is, in addition, altogether unfair and unjust to this injured railroad employee. Also, as Judge

Bellacosa's dissent suggests, this decision by the New York Court of Appeals appears to impose upon a FELA plaintiff a greater burden of proof than does New York law generally in a negligence action (see A15-16) -- which can only be interpreted as impermissible discrimination against those whom this federal legislation was intended to benefit and protect.

4. IF THIS ASPECT OF TOOPS DOES STILL HAVE FORCE AS PRECEDENT, THEN THIS COURT SHOULD GRANT CERTIORARI TO MAKE CLEAR TO THE LOWER COURTS WHAT EFFECT MUST BE GIVEN TO THIS PRECEDENT.

As noted, the last time this Court cited Toops was in 1944, a half-century ago. No federal court of appeals regards this statement from Toops as declaratory of current FELA law. Nor, apart from this case, is there any recent state highest court decision of which we are aware which has so read and applied

Toops. But cf., Chapman v. Union Pacific R. Co., 237 Neb. 617, 467 N.W.2d 388 (1991) (citing Toops in holding that plaintiff failed to sufficiently establish that the absence of a seat belt had caused his injury; plaintiff had failed to produce expert medical evidence linking the condition complained of to the accident).

Now, however, we have the New York Court of Appeals, historically considered a court of national stature, citing and relying upon, indeed placing overwhelming reliance upon, this statement in Toops as a currently controlling FELA sufficiency of evidence precedent.

Accordingly, it can now undoubtedly be expected that very shortly defense counsel in FELA and Jones Act cases nationally will as a matter of course be urging courts to dismiss complaints based

on Toops (as Toops has been read and applied in this case), and those courts will now have to carefully consider what effect should be accorded to Toops in cases where a defendant can muster any sort of argument that a jury verdict in the plaintiff's favor would have to be based on speculation.

Unless this Court addresses this issue, this situation is certain to breed confusion, and to cause delay in the administration of justice. It will, at the least, cause confusion and delay in FELA actions brought in the state courts in New York. Likewise, it will discourage FELA plaintiffs from bringing their actions in the New York state courts, notwithstanding they are fully entitled to sue in those courts. See, e.g., Hilton v. South Carolina Pub. Ry. Comm., 502 U.S. ___, 116 L.Ed.2d 560, 112 S.Ct. 560.

Also, as long as this decision stands uncorrected by this Court, this may well discourage FELA plaintiffs in other states from resorting to the courts of their states, which would only add to the already great burdens on our federal district courts. Also, if this decision is allowed to stand uncorrected by this Court, this may well embolden courts in other states to believe that this is an area of the law in which this Court is not concerned with securing compliance with its prior decisions and vindicating the intent of Congress as expressed in this legislation.

And, it is submitted, all of these considerations argue most strongly for this Court's granting certiorari in this case. Compare Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54, 73 (1944)

(Frankfurter, J., concurring) (indicating that it "is most desirable . . . that the law should not be cloudy and confused" in this field).

If this statement in Toops has today any precedential force beyond what this Court has said with respect to "speculation" and the role of the jury in cases such as Basham, Gallick, Rogers, and Lavender v. Kurn, then, it is submitted, in fairness to FELA litigants and the lower courts, this Court should speak clearly and directly to this issue. It should tell us what Toops now means.

Likewise, if this statement in Toops may now properly be considered as having no precedential force, this Court should make it clear that this is so. This statement in Toops is this Court's creation. And, properly, this Court is the body which should say what is its

current status. Cf. Rodriguez de Quijas v. Shearson/American Express, 490 U.S., at 484. Albeit Toops is dated and its so broad statement concerning speculation has been effectively overruled, only this Court can finally and absolutely, definitively, say that this is so. Id.

CONCLUSION

For these reasons, this Court should grant a writ of certiorari to review the decision and order of the New York Court of Appeals in this case.

Respectfully submitted,

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March 29, 1993

APPENDIX

DECISION AND ORDER OF NEW YORK COURT OF APPEALS DATED AND ENTERED DECEMBER 21, 1992

STATE OF NEW YORK
COURT OF APPEALS

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1 No. 275

Thomas W. Curley,
Appellant,
v.

Consolidated Rail Corporation,
Respondent,
v.

Excelsior Truck Leasing Company,
Third-Party Respondent.

L. Kevin Sheridan, for appellant.
Lawrence R. Bailey, Jr., for respondent.
Terrence P. O'Reilly, for third-party respondent.

MEMORANDUM:

The order of the Appellate Division should be affirmed with costs.

Plaintiff commenced an action against his employer Consolidated Rail

Corp. ("Conrail"), pursuant to the Federal Employers' Liability Act (45 U.S.C. Sec. 51 et seq.), to recover damages for injuries sustained while he was driving one of Conrail's vehicles. After a jury trial, a judgment and verdict was rendered in plaintiff's favor.

The Appellate Division modified, on the law, vacating the judgment and verdict and dismissing the complaint, on the ground that plaintiff had not satisfied the standard of review applicable to actions brought under the Federal Employers' Liability Act ("FELA"), i.e., "whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought" (Rogers v Missouri Pac. R.R. Co., 352 US

500, 506 [1957], reh denied 353 US 943 [1957]; Atchison, Topeka & Santa Fe Ry. Co. v Buell, 480 US 557, 561-562 [1987]).

Plaintiff's evidence consists primarily of the testimony that the vehicle he was driving at the time of the accident had been frequently complained about and repaired, had been in service longer than the normal life span of these vehicles, and had been driven many thousands of miles. Even under the "low and liberal" standard applicable to FELA cases (Smith v National R.R. Passenger Corp., 856 F2d 467, 469 [2d Cir 1988], plaintiff's evidence is insufficient as a matter of law, without total speculation (Atchison, Topeka & Santa Fe Ry. Co. v Toops, supra, at 355), to permit the inference that any negligent act or omission on Conrail's part caused his injuries.

The dissent's position to the contrary is unpersuasive for several reasons. First, there is nothing in the Appellate Division's ruling to indicate that it departed from existing law and limited its review of the evidence to the plaintiff's proofs. Second, the additional evidence submitted by defendant Conrail does not support plaintiff's case. For instance, the testimony of Conrail's expert, so heavily relied upon by the dissent, refers to the effects on police vehicles of their increased use. There is no relationship between that testimony and the car in which plaintiff was injured in particular. Further, the cross-examination testimony of Conrail's service manager is not supportive of plaintiff's case. Finally, the dissent's enumeration of more examples of

"possible" negligence on Conrail's part does not add anything but mere speculation to the proof that Conrail caused plaintiff's injuries.

BELLACOSA, J. (dissenting):

I respectfully dissent and vote to reverse the order of the Appellate Division and reinstate the judgment of Supreme Court, predicated on a jury verdict in favor of the plaintiff for $983,000.

This Federal Employees Liability Act ("FELA") action to recover for permanently disabling back injuries sustained while plaintiff was employed as a police officer by the defendant Conrail is governed exclusively by well-settled Federal law principles (see, Basham v Pennsylvania R.R. Co., 372 US 699, 700-701, revg 11 NY2d 991, citing Lavender v Kurn, 327 US 645). Additionally, under

New York precepts of appellate review, the evidence presented to the factfinder, usually a jury, at trial must be construed in the light most favorable to plaintiff (Lane-Real Estate Dept. Store v Lawlet Corp., 28 NY2d 36, 42; see also, Cohen v Hallmark Cards, 45 NY2d 493).

On March 6, 1984, plaintiff was driving a Conrail company car, #360, at approximately 40 to 45 m.p.h., when the car came to an abrupt stop, skidded and threw him forward and across the driver's seat. Car #360 was used on a daily basis by plaintiff and two other police officers on their respective duty shifts. In a typical work day, hundreds of miles would be travelled in the car. At the time of plaintiff's accident, car #360 had been driven at least 164,000, and more likely, 264,000, miles.

A Ford Motor Company engineer called

as an expert witness by defendant Conrail stated on cross-examination that due to the additional abuse and stress placed on police cars, 150,000 miles on such cars would be "harder" miles than those accumulated on ordinarily used cars.; also, parts wear out faster than those on non-business used cars with similar mileage. The expert witness also stated that, at the odometer range of car #360, parts would be constantly wearing out and breaking; and that if something had broken off and jammed into the gears or the differential, this would cause a car to slow down or stop abruptly. Plaintiff testified that car #360 had done just that at the time of the accident.

Defendant Conrail also presented testimony of its service manager, who inspected car #360 after the accident. While this witness on direct examination

refuted plaintiff's account of how the accident happened, he acknowledged on cross-examination that he had not inspected either the transmission or the emergency brake cable, and that it was possible that a malfunction in either of these parts could have caused the wheels to lock up, as plaintiff described the happening and cause of the accident.

This testimony, in conjunction with the documentary evidence, which established that car #360 needed repairs frequently and was the subject of complaints on numerous occasions by all three of the officers who drove it, supports the inference that car #360 was subject to the degree of wear and deterioration attributed by defendant's expert witness to police cars at this odometer range. Plaintiff testified that since it had been assigned to West

Haverstraw, the car made several unexplained noises, including "whooshing" and "grinding" sounds, and that each time the vehicle stopped he would hear a "hard clunk".

One of the officers testified that in 1982, when car #360 had approximately 140,000 miles on it, and again in 1983, he experienced the same problem with it that occurred on the date of plaintiff's accident, i.e., the car would come to an abrupt stop and then not be operational for a few minutes. Plaintiff's co-officer added that he complained to his superiors, both orally and through his daily vehicle report sheets. He also mentioned the trouble to plaintiff and to the third co-officer operator. Most relevantly, this witness complained about the performance of, and trouble with, car #360 on March 5, 1984, the day before the

accident, with respect to the very problem described as the happening of the accident.

Conrail required its officers to report any problems with cars to their supervisors. Plaintiff's problems were noted in his daily vehicle reports, as were those of his co-officers. The supervising lieutenant at the time of the accident testified at trial as a witness for Conrail that it was his responsibility to oversee the maintenance of the cars. He admitted that he did not usually look at the daily vehicle reports because it was not "necessary".

Under traditional appellate review standards, and especially under the strictures governing a FELA jury verdict, courts cannot devalue or disregard substantial portions of testimonial and documentary evidence simply because it

was presented by defendant's witnesses. In any sufficiency of the evidence review situation, appellate courts must consider all the evidence, including that which is presented by or elicited from a defendant (National Bank of North America v Systems Home Improvement, Inc., 69 AD2d 557,562, affd 50 NY2d 814). The Appellate Division in this case alluded to only the evidence presented by the plaintiff and stated that as matter of law "that evidence" was insufficient (178 AD2d 318, 320). The appellate court evidently failed to consider the evidence adduced on defendant's case which, ironically, happened to be in considerable aid of plaintiff's case. This failure to reflect adherence to the correct and complete standard of review supports a reversal in this case.

More compelling, still, for reversal

is the evident disregard by the reviewing appellate courts of the governing Federal standards as they should be applied in this case. Under Federal law, a FELA case must be sent to the jury -- and its verdict must be accorded a unique level of deference --when the plaintiff has presented proof, which may be entirely circumstantial, "from which the jury may with reason" infer that the "negligence of the employer played any part, however small, in the injury or death which is the subject of the suit" (Rogers v Missouri Pacific R.R. Co. 352 US 500, 508 [emphasis added] [citation omitted]). That "low and liberal" formula -- a filament-thin standard among the slightest known to the law, short of insurer-type strict liability -- is the exclusive governing standard (Smith v National R.R. Passenger Corp., 856 F2d

467, 469, quoting Diebold v Moore McCormack Bulk Transp. Lines Inc., 805 F2d 55. 58).

Notably, A.T. & S. F. Railway Co. v Toops (281 US 351) does not lend support to the Appellate Division's reversal of this jury verdict. Examined in the context of more refined governing principles and precedents, Toops merely stands for the proposition that a jury verdict in a FELA case may not be based entirely on speculation (id., at 354-355). The nuance is that a verdict may involve some speculation when "the evidence is such that fair minded [individuals] may draw different inferences" (Lavender v Kurn, 327 US 645, supra, at 653). Thus, speculation is essentially irrelevant and not dispositive, as long as it does not displace probative facts and permissible

inferences drawn from evidentiary facts (Tennant v Peoria & P.U.R. Co., 321 US 29, 32-33, rehrg denied 321 US 802). In both Lavender and the instant case, there was circumstantial evidence to support the plaintiff's theory as to the cause of the injury and the negligence of the employer (see, Lavender v Kurn, 327 US 645, supra). They thus differ materially from Toops, where there was no proof of any kind and only speculation.

In the instant case, plaintiff offered, as a layperson driver, direct evidence of what happened. On this base, complemented by defendant's significant additional expert and documentary proof and plaintiff's evidence of frequent repairs and complaints, plaintiff built the inference that the employer was negligent. The employer either failed to seek or locate the source of the problem

with car #360, or neglected to take car #360 out of service when the employee-drivers' complaints could not be rectified. Under the slim minimum requirements of Federal law, the jury is also allowed to infer negligence solely from the failure of the employer's supervisor to review the daily vehicle reports in which operator-employees had documented the persistent problems with car #360 -- the very types of things that happened in the pertinent accident. The fact that these inferences of negligence may, as the majority accentuates, include some degree of speculation, should not be fatal to plaintiff's case, because the inferences are in significant part supported by the whole of the proofs at trial (see, Rogers v Missouri Pacific R. R. Co., 352 US 500, supra, at 508). Even under the relatively more demanding

review requirements of New York in traditional negligence cases, the evidence in this case was sufficient to sustain the jury's verdict (see, Cohen v Hallmark Cards, 45 NY2d 493, supra; see also, Noseworthy v City of New York, 298 NY 76, 79).

Significantly, Basham v Pennsylvania R. Co. (372 US 699, revg 11 NY2d 991, supra) points to reversal and reinstatement of the jury verdict in the instant case, the very result decreed by the United Stets Supreme Court in that case. There, the employee was injured when a platform on which he was lying moved, causing him to drop a 100-pound wheel spring onto his left index finger, which was later amputated. Defendant argued that it was impossible for the injury to have occurred as that employee alleged. The employee countered by

introducing evidence of prior complaints in similar, relevant work-related situations. The United States Supreme Court found that the resolution of the conflicting testimony was the province of the jury and reversed our Court for having "invad[ed] the function and province of the jury [by] setting the verdict aside" (Basham v Pennsylvania R. Co., supra, 372 US 699, supra, at 701, revg 11 NY2d 991). At the least, the persistent prior complaints involving car #360, including one the day before the accident at issue, provide , in my view, greater and weightier evidence to support a jury verdict that was present in Basham.

Since a jury verdict in a FELA case may be overturned only "where there is a complete absence of probative facts to

support" the verdict (Lavender v Kurn, 327 US 645, 653, supra; see also, Tennant v Peoria & P.U.R. Co., 321 US 29, 35, supra, rehg denied 321 US 802; Basham v Pennsylvania R. Co., supra), no justification is presented for the appellate courts of this State again to invade and overturn the jury's correct resolution of this case. Finally, in noting that so little is required to sustain a FELA verdict, I am puzzled as to how the Court can justify the result on this record. Therefore, I vote to reverse and reinstate the judgment in plaintiff's favor based on the jury verdict after a trial thoroughly fought out on both sides.

* * * * * * * * * * * *

Order affirmed, with costs, in a memorandum. Acting Chief Judge Simons and Judges Kaye, Titone, Hancock and Smith concur. Judge Bellacosa dissents and votes to reverse in an opinion.

Decided December 21, 1992

REMITTITUR OF THE NEW YORK COURT OF APPEALS DATED DECEMBER 21, 1993

STATE OF NEW YORK
COURT OF APPEALS

The Hon. Richard D. Simons, Acting
Chief Judge, Presiding

1 No. 275

Thomas W. Curley,
Appellant,
v.

Consolidated Rail Corporation,
Respondent,
v.

Excelsior Truck Leasing Company,
Third-Party Respondent.

The appellant in the above entitled appeal appeared by Sable, Gold & Dinhofer, P.C.; the respondent appeared by Walker & Bailey, Esqs.; and the third-party respondent by Foley Hickey Gilbert & O'Reilly.

The Court, after due deliberation, orders and adjudges that the order is affirmed, with costs, in a memorandum.

Acting Chief Judge Simons and Judges Kaye, Titone, Hancock and Smith concur. Judge Bellacosa dissents and votes to reverse in an opinion.

The Court further orders that this record of the proceedings in this Court be remitted to the Supreme Court, New York County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

s/_____

Donald M. Sheraw, Clerk of the Court

Court of Appeals, Clerk's Office, Albany, New York, December 21, 1993

DECISION AND ORDER OF THE APPELLATE DIVISION, FIRST DEPARTMENT ENTERED DECEMBER 24, 1991

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION-FIRST DEPARTMENT

Murphy, P.J., Carro, Rosenberger, Wallach, Ross, JJ.

43935 Thomas W. Curley,
Plaintiff-Respondent,

-against-

Consolidated Rail Corporation,
Defendant-Appellant,

Consolidated Rail Corporation,
Third-Party Plaintiff-Appellant,

-against-

Excelsior Truck Leasing Company,
Third-Party Defendant-Respondent.

Judgment, Supreme Court, New York County (Hugh Gilbert, J., and a jury), entered July 25, 1990, in favor of plaintiff and against defendant in the sum of $989,058.17, and dismissed the

Third-party complaint, is modified, on the law, to the extent of vacating the judgment and verdict in favor of the plaintiff against defendant, and dismissing the complaint, and otherwise affirmed, without costs.

Since 1978, Mr. Thomas W. Curley (Officer Curley) had been employed by Consolidated Rail Corporation (Conrail) as a police officer, and in March 1984, he was assigned to Conrail's police station located at West Haverstraw, New York, where he worked the 4:00 p.m. to midnight tour.

On March 6, 1984, at approximately 9:50 p.m., while on routine motor patrol, in Car 360, Office Curley was driving, at a speed of between 40 and 45 miles per hour, south on Route 9W from Bear Mountain. Suddenly, as he was proceeding down a slight incline, the vehicle

abruptly stopped, skidded on the pavement, throwing him forward and across the driver's seat. As a result of the incident, Officer Curley alleges he suffered injuries to his back.

By summons and complaint, in August 1984, Officer Curley (plaintiff) commenced, pursuant to the Federal Employers' Liability Act (45 U.S.C. Sec. 51 et seq), an action against Conrail (defendant) to recover damages for his injuries, in the Supreme Court, New York County. Thereafter, since defendant leased Car 360, which was 1981 Ford LTD, from Excelsior Truck Leasing Company (Excelsior), it commenced a third-party action against Excelsior and the Ford Motor Company (Ford). Prior to trial, defendant discontinued the third-party action against Ford, with prejudice.

A jury trial resulted in a verdict

in favor of the plaintiff against the defendant in the sum of $989,058.17, and in favor of the third-party defendant Excelsior on the third-party claim. Defendant appeals.

Since the plaintiff brought the instant action under the Federal Employers' Liability Act (FELA), "the proper standard of review is that which has been developed in FELA cases and not those applied in the usual common-law negligence actions..." (Richards v So. Buffalo Ry, 54 AD2d 310, 311 (1976)).

Repeatedly, the United States Supreme Court has held that under FELA "the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought..." (Rogers v Missouri

Pacific R. Co., 352 U.S. 500, 506 (1956), rehearing denied 353 U.S. 943 (1957)).

While "the standard of causation in an FELA action is a 'low and liberal ' one..." (Smith v National R.R. Passenger Corp., 856 F.2d 467, 469 (2d Cir. 1988)), the United States Supreme Court, in A. T. & S. F. Ry. Co. v Toops, 281 U.S. 351, 354-355 (1930), has held unequivocally that a jury in a FELA case is not to engage in speculation in order to determine whether the negligence of the employer caused the injury. Specifically, that Court stated "[b]ut proof of negligence alone does not entitle the plaintiff to recover under the Federal Employers' Liability Act. The negligence complained of must be the cause of the injury. The jury may not be permitted to speculate as to its cause and the case

must be withdrawn from its consideration unless there is evidence from which the inference may reasonably be drawn that the injury suffered was caused by the negligent act of the employer... [citations omitted]..." (id.) [material in brackets added]. Further, the Court of Appeals has stated "if there is any principle of law that is too well settled to require extensive citation of authority, it is that a jury finding based on speculation is a nullity (Lahr v Tirrill, 274 N.Y. 112, 117)..." (Feblot v New York Times Co., 32 NY2d 486, 494 (1973)).

Our examination of the trial transcript indicates that plaintiff's evidence of causation came from his own testimony, that of Conrail Police Officer James Libruk (Office Libruk), and the deposition testimony of Conrail Police

Officer Douglas Mendik (Officer Mendik). While plaintiff worked the 4:00 p.m. to midnight tour, Officer Libruk worked the midnight to 8:00 a.m. tour, and Officer Mendik worked the 8:00 a.m. to 4:00 p.m. tour. During their tours, each of the officers drove Car 360.

Officers Libruk and Mendik, as well as the plaintiff, testified that Car 360 was frequently being repaired, and, from time to time, all of them had experienced mechanical difficulties in operating that vehicle, and had complained about its performance. Further, plaintiff testified that, based upon information he received from an unnamed union representative, a police vehicle like Car 360 is kept in service between eighteen months and two years. Office Libruk testified that, by late 1982, Car 360 had been driven approximately 140,000 mile,

and Officer Mendik stated that he believed that the odometer on Car 360 had been rolled over twice.

The plaintiff was unable to give any specific reason, other than speculation, for the cause of the alleged accident, since he testified, on direct examination, that, before Car 360 abruptly stopped, he "didn't hear anything or feel anything. I was very relaxed...[and] I believe the wheels locked on me because I did skid. The car did skid...I felt it and I heard it..." (see, Trial Transcript (TT), at 140-141). Further, Plaintiff admitted, during cross-examination, that, after the accident and before the tow truck arrived, he believes he moved Car 360 forward and backward without any apparent difficulty (see, TT, at 361).

Applying the legal authority, supra.

to the facts of the instant case, we find that the plaintiff's only evidence, unsupported by any expert testimony, indicating that defendant's negligence caused his accident, consists of his allegations that the subject vehicle had been frequently repaired, complained about, was more than eighteen months old, and had been driven thousands of miles. We further find that evidence insufficient as a matter of law, without speculation, to permit the jury to reasonably draw the inference "that the injury suffered was caused by the negligent act of the employer..." (A. T. & S. F. Ry. Co. v Toops, supra). In reaching our conclusion, we have given the plaintiff "the benefit of every reasonable inference which can reasonably be drawn from that evidence..." (Hylick v Halweil, 112 AD2d 400 (1985)).

In view of our determination that the plaintiff did not make out a prima facie case, as a matter of law, we do not reach the other contentions of error made by defendant.

At the close of the plaintiff's case, the defendant moved to dismiss the complaint "on the ground the plaintiff... failed to make out a prima facie case on the issue of liability both in terms of negligence and in terms of proximate cause...", and the Trial Court, after hearing argument, denied the motion, "without prejudice...to any post judgment or verdict motions which may be appropriate" (see, TT, at 733-741). Thereafter, at the close of trial, defendant moved to set aside the verdict and dismiss the complaint on the ground that plaintiff had "[f]ailed as a matter of law to prove that the defendant...was

negligent...", and again, the Trial Court, after hearing argument, denied "the motion with exception..." (see, TT, at 1377-1379). We note that defendant's notice of appeal indicates that the "appeal is taken from each and every part of said judgment as well as the whole thereof" (see, Record on Appeal, at 4a-5a).

Since defendant took timely exception to the denial of the motion to set aside the verdict and dismiss the complaint, we find that issue has been preserved for our review (CPLR Sections 4017, 5501). Although defendant has not specifically requested on appeal the relief that the complaint be dismissed, we find that we can grant such relief, based upon our "power to search the record and award summary judgment..." (Merritt Hill v Windy Hgts., 61 NY2d 106,

111 (1984)). Further, the Court of Appeals has held that "[i]t is, of course, axiomatic that, once an appeal is properly before it, a court may fashion complete relief to the appealing party..." (Hecht v City of New York, 60 NY2d 57, 62 (1983)). [material in brackets added].

Accordingly, we modify to the extent of vacating the judgment and verdict in favor of the plaintiff against the defendant, and dismiss the complaint.

All concur except Wallach, J., who dissents in a memorandum as follows:

WALLACH, J. (dissenting):

While I agree that this record warrants reversal of the judgment in plaintiff's favor, I part company with the majority insofar as they would dismiss the action instead of remanding

it for a new trial. Neither in its brief, nor even in oral argument, has defendant urged dismissal of the complaint. True, defendant did move for that relief twice during trial, which is simply to say that the point was technically preserved. But, preservation of error in the course of trial is one thing, and presentation of that error at the appellate level is quite another. It is undisputed that, on this appeal, defendant abandoned any dismissal argument, seeking only a reversal for new trial based upon other trial errors. For us to dictate, sua sponte, the total extinction of this action -- relief which defendant never sought on appeal -- is manifestly unfair to the plaintiff, especially when we do so without the slightest advance notice to him. This court should not reach beyond the scope

of the appeal as framed by defendant-appellant, and upon which plaintiff has justifiably relied in formulating his appellate response. To pull the whole rug out from under plaintiff in this fashion is tantamount to a denial of due process.

Furthermore, although as a formal matter the majority purports to rest its dismissal on the law alone, its discussion of the case clearly indicates that plaintiff presented a discernible quantum of evidence on every element of his cause of action, and all this in the context of an FELA claim where the acknowledged test is "whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." (Rodgers v. Missouri Pacific R. Co., 352 U.S.> 500, 506 [underscoring added].)

Thus formalities aside, the actuality here is that the reversal rests not only on the law but also upon negative appraisal of the weight of the evidence, and therefore is based upon "the facts" as well. Therefore, outright dismissal exceeds our authority. In Lane--The Real Estate Department Store v. Lawlet Corp. (28 NY2d 36), the Appellate Division had reversed a judgment after jury trial in the plaintiff's favor (as the majority is really doing here), "on the law and the facts" (33 AD2d 924). The Court of Appeals ruled that in a jury case the Appellate Division lacks the power to reverse on the facts (even as an alternative), and at the same time to dismiss the complaint. Under such circumstances, the Appellate Division "must order a new trial" (28 NY2d at 45), and we should do so here.

In sum, the Appellate Division can reverse on the law and dismiss the complaint only if there was no evidence at trial in the plaintiff's favor upon an essential element of his cause of action (Feinberg v. Saks & Co., 56 NY2d 206, 211). Once a jury verdict is to be set aside as "against the weight of the evidence" (as defendant urged herein), a new trial is necessary (Martin v. City of Albany, 42 NY2d 13), and the Appellate Division has so held on numerous occasions (Barker v. Bice, 87 AD2d 908; Parksville Mobile Modular v. Fabricant, 73 AD2d 595, 600, app dsmd 49 NY2d 801; Evan v. Wilson, 70 AD2d 895; Ellis Hospital v. Little, 65 AD2d 644, 646, mot to dsms app qtd 47 NY2d 951). Our decision in Labriola v. City of New York (129 AD2d 505, 506, lv denied 70 NY2d 604) is not to the contrary. Our

affirmance of dismissal by the trial court there rested on plaintiff's failure to plead, and to offer any evidence in support of, a special duty to him undertaken by the defendant municipality, an essential element of his cause of action.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

ENTERED: December 24, 1991

s/Francis X. Galdi

JUDGMENT OF SUPREME COURT, NEW YORK COUNTY, ENTERED JULY 25, 1990

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

THOMAS W. CURLEY,
Plaintiff,

-against-

Index No.
25656/84

CONSOLIDATED RAIL CORPORATION,
Defendant,

CONSOLIDATED RAIL CORPORATION,
Third-Party Plaintiff,

-against-

EXCELSIOR TRUCK LEASING COMPANY,
Third-Party Defendant.

The above entitled action, having duly come on to be heard before the Honorable Hugh Gilbert and duly constituted jury of six, at an Individual Assignment Part 44 of this Court, and the case having been tried on the 20th, 21st, 22nd, 25th, 26th, 27th, 28th, 29th days of June and the 2nd and 3rd days of July 1990, and the plaintiff having been

represented by Fredric M. Gold, Esq., of the office of Jesse C. Sable, P. C., the defendant having been represented by Lawrence Bailey, Esq., of Walker & Bailey, Esqs., and the Third Party Defendant having been represented by William Kennedy, Esq., and the jury having duly deliberated and found the verdict on July 5th, 1990 in favor of the plaintiff Thomas W. Curley, and against the defendant Consolidated Rail Corporation, and in favor of the Third Party defendant, Excelsior Truck Leasing Company, and against the Third Party plaintiff, Consolidated Rail Corporation, and it is .

NOW, on motion of Jesse C. Sable, the attorney for the plaintiff, Thomas W. Curley,

ADJUDGED that plaintiff THOMAS W. CURLEY, residing at M.D. 5, Oak Drive,

Monroe, NY 10950, do recover against the defendant CONSOLIDATED RAIL CORPORATION, 744 Broad Street, Newark, NJ 07102, the sum of $983,000.00, together with interest thereon from July 5, 1990, at the rate of 9% per annum, in the sum of $4,847.67 together with costs and disbursements of this action in the sum of $1,210.50, in the present sum of $989,058.17 and that plaintiff have execution therefore, and it is

FURTHER ADJUDGED that the Third Party defendant, EXCELSIOR TRUCK LEASING COMPANY, residing at 1100 Ridge Pike, Conshohoken, PA 19428, do recover of the Third Party plaintiff, CONSOLIDATED RAIL CORPORATION, 744 Broad Street, Newark. NJ 07102, costs and disbursements of this action in the sum of $950.00, and the

Third Party defendant have execution therefore,

Norman Goodman
CLERK

FILED JULY 25, 1990, COUNTY CLERK'S OFFICE, NEW YORK

ORDER OF NEW YORK COURT OF APPEALS ENTERED FEBRUARY 25, 1993, DENYING REARGUMENT

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-fifth day of February A.D. 1993

Present, Hon. Richard D. Simons, Acting Chief Judge, Presiding

---

Mo. No. 117

Thomas W. Curley,
Appellant,
v.

Consolidated Rail Corporation,
Respondent,
v.

Excelsior Truck Leasing Company,
Third-Party Respondent.

A motion for reargument to the Court of Appeals having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation thereon had, it is

ORDERED, that the said motion be and the same hereby is denied with one hundred dollars costs and necessary reproduction disbursements.

s/_____
Donald M. Sheraw
Clerk of the Court

ORDER OF APPELLATE DIVISION, FIRST DEPARTMENT ENTERED MARCH 24, 1992, GRANTING LEAVE TO APPEAL TO THE COURT OF APPEALS

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on March 24, 1992

Present - Hon. Francis T. Murphy
Presiding Justice
John Carro
Ernst H. Rosenberger
Richard W. Wallach
David Ross
Justices

Thomas W. Curley,
Plaintiff-Respondent,

-against- M-331

Consolidated Rail Corporation,
Defendant-Appellant,

Consolidated Rail Corporation,
Third-Party Plaintiff-
Appellant,

-against-

Excelsior Truck Leasing Company,
Third-Party Defendant-
Respondent.

Plaintiff-respondent having moved for reargument of, or in the alternative for leave to appeal to the Court of Appeals from, the decisions and order (Appeal No. 43958) of this Court entered on December 24, 1991,

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is ordered that, wherein it seeks reargument, the motion be and hereby is denied, and is granted wherein leave to appeal is sought; and this Court, pursuant to CPLR 5713, states that questions of law have arisen which ought to be reviewed by the Court of Appeals.

ENTER:

s/Francis X. Galdi

Clerk

ORDER OF THE APPELLATE DIVISION, FIRST DEPARTMENT ENTERED NOVEMBER 9, 1989

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on March 24, 1992

Present: Milonas, J.P., Rosenberger, Ellerin, Rubin, JJ.

Thomas W. Curley,
Plaintiff-Respondent,

-against-

Consolidated Rail Corporation,
Defendant-Appellant,

Consolidated Rail Corporation,
Third-Party Plaintiff-Appellant,

-against-

Excelsior Truck Leasing Company,
Third-Party Defendant-Respondent.

Order, Supreme Court, New York

County (Harold Baer, Jr.), entered on June 16, 1989, unanimously affirmed, without costs and without disbursements. We find no abuse of the IAS Court's discretion. No Opinion.

ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK ENTERED JUNE 16, 1989

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Harold Baer, Jr.

Thomas W. Curley,
-against-
Consolidated Rail Corp.

Index No.
25656/89

The following papers read on this motion to dismiss

	Papers Numbered
Notice of Motionon/Order to Show Cause - Affidavits - Exhibits	1-3
Answering Affidavits - Exhibits	4
Replying Affidavits	

Upon the foregoing papers it it ordered that these motions to dismiss under Sec 3404 & cross-motion to restore are resolved as follows: The motion is granted unless the plaintiff's attorney pays to the Client Security Fund $500 & files a note of issue all within 30 days

from the date hereof. The matter will be added to the August trailing trial calendar & there will be a final pre-trial conference on Monday June 26, 1989 should the above conditions be accomplished.

Dated 6/6/89

s/Harold Baer, Jr.

J.S.C.

FILED
JUNE 16,1989
COUNTY CLERK, NEW YORK

Supreme Court, U.S.
FILED
APR 28 1993
OFFICE OF THE CLERK

No. 92-1598

In The

Supreme Court of the United States

October Term, 1992

THOMAS W. CURLEY,

Petitioner,

-against-

CONSOLIDATED RAIL CORPORATION and EXCELSIOR TRUCK LEASING COMPANY,

Respondents.

On Petition For A Writ Of Certiorari To The New York Court Of Appeals

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Is a jury verdict in a Federal Employers' Liability Act lawsuit based on **total speculation** sustainable?

2. Is a railroad an insurer of the safety of its employees requiring the finding of liability merely because an accident occurred?

3. Since Petitioner fails to raise any novel or undecided question of federal law and the Courts Below based their respective decisions on the analysis of the evidence in the case, should the Supreme Court of the United States grant the Petition for a Writ of Certiorari?

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

PRELIMINARY STATEMENT[1]

Petitioner THOMAS W. CURLEY seeks a Writ of Certiorari to the Court of Appeals of the State of New York from an Order of said Court entered on December 21, 1992, which affirmed by a five to one vote the dismissal of the Petitioner's Complaint and the reversal of a Judgment entered by the lower Court in favor of the Petitioner.

The Court of Appeals of the State of New York, by a five to one vote and the Appellate Division First Department of the State of New York, by a four to one vote, found that Petitioner, at trial, had failed to make a prima facie case. Petitioner failed to produce evidence sufficient as a matter of law that any negligent act or omission on the part of Respondent CONSOLIDATED RAIL CORPORATION caused Petitioner's injuries.

The Supreme Court of the United States should not grant the Petitioner's Writ of Certiorari. Petitioner, in an attempt to create a federal question, erroneously claims that the Courts Below[2] in their opinions disregarded the

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[1] Pursuant to Rule 29.1, a list of the related corporations of the Respondent CONSOLIDATED RAIL CORPORATION is annexed hereto as Appendix A.

[2] As used in this brief, "Courts Below" refers to the Court of Appeals of the State of New York and the Appellate Division First Department of the State of New York.

Congressional intent in enacting the Federal Employers' Liability Act. (Petition P. 31.) However, the Courts Below, after properly reviewing the applicable case law, the statutory law and the evidence adduced at trial, rejected Petitioner's claim and ruled that under federal law, Petitioner had failed to provide sufficient evidence to prove that Respondent CONSOLIDATED RAIL CORPORATION's negligence was a cause of Petitioner's injuries. Congress, in enacting the Federal Employers' Liability Act did not intend to hold an employer absolutely liable for any and all injuries to its employees. Petitioner failed to establish that Respondent CONSOLIDATED RAIL CORPORATION's negligence played any part, no matter how slight, in causing Petitioner's injuries.

Since Petitioner has failed to assert any federal questions, Petitioner's Writ of Certiorari must not be granted. Furthermore, Petitioner's Writ of Certiorari should be denied, because the issues before the Supreme Court are merely factual ones which would be of no importance except to the litigants themselves.

Petitioner's basic argument is that there was sufficient evidence to establish causation as to Respondent CONSOLIDATED RAIL CORPORATION's alleged negligence. Issues relating to sufficiency of evidence are factual, therefore the Supreme Court of the United States should not review such factual findings. The majority of the justices of the Appellate Division First Department having heard the evidence concluded that there was not enough evidence supporting Petitioner's claim; the Court of Appeals reached the same result. It would be improvident for the Supreme Court of the United States to grant

the Writ of Certiorari since the issues to be placed before this Court are merely factual ones.

STATEMENT OF THE CASE

On March 6, 1984, Petitioner Thomas W. Curley was employed by Respondent CONSOLIDATED RAIL CORPORATION as a police officer. Petitioner alleges that he was on routine patrol in Rockland County, New York and was driving a 1981 Ford LTD automobile owned by Respondent EXCELSIOR TRUCK LEASING COMPANY which was leased to Respondent CONSOLIDATED RAIL CORPORATION. The vehicle was designated as Car 360 ("the Car") by Respondent CONSOLIDATED RAIL CORPORATION.

At trial, Petitioner testified that he was traveling at approximately 40 miles per hour immediately before the alleged occurrence. Petitioner further testified that prior to the accident he did not hear anything or feel anything unusual as he was driving Car 360. Petitioner states that there was a sudden deceleration of the Car, the Car skidded and then rolled to a stop on the side of the highway. The Car did not come into contact with any objects. The Petitioner incredulously claimed to be thrown forward with such force as to herniate two (2) discs in his lower back.[3]

[3] The disinterested testimony of Mr. Thomas Shaw, an engineer and automotive expert from The Ford Motor Company, was that in his opinion, such was impossible.

Petitioner adduced no evidence at trial as to why and how the car made the alleged abrupt stop. In fact, Petitioner's attorney at trial commenting on the cause of the accident in his summation stated that "it could have been anything that happened." The evidence disclosed neither a defect in the vehicle nor any mechanical problem with Car 360. Petitioner did not provide any expert testimony as to the cause of the accident.

The Petitioner, thereafter, commenced this action in negligence alleging that Respondent had violated the Federal Employers Liability Act. The Respondent CONSOLIDATED RAIL CORPORATION served its Answer and commenced a Third-Party Action against Respondent EXCELSIOR TRUCK LEASING COMPANY, the owner-lessor of the Car and against The Ford Motor Company, the manufacturer of the vehicle. The action against Ford was discontinued with prejudice prior to trial.

The testimony at trial demonstrated that maintenance was performed on Car 360 regularly, pursuant to a maintenance schedule and repairs were performed as needed by the agents of the Respondent EXCELSIOR TRUCK LEASING COMPANY.

The Petitioner offered absolutely no evidence that any specific or identified defect was present in Car 360. He offered absolutely no evidence of what caused the alleged movement of Car 360. To the contrary, Respondent CONSOLIDATED RAIL CORPORATION offered definitive evidence in the disinterested testimony of Thomas Shaw, an engineer employed by Ford Motor Company. Mr. Shaw testified that he was thoroughly familiar with the 1981 Ford LTD, the make and model of

the vehicle in question. Based upon the facts as testified to by Petitioner, Mr. Shaw was asked whether he had an opinion, with a reasonable degree of engineering certainty, as to the mechanical cause of the accident as claimed by Petitioner. Mr. Shaw testified that "there was no mechanical defect" and "there was no accident". Mr. Shaw also testified "that nothing would have slowed the car down like that".

Mr. Shaw categorically rejected Petitioner's total speculation as to why the alleged accident occurred. Petitioner testified that preceding the date of this incident, Petitioner had noticed that the car was making strange noises, seemingly coming from the area of the rear axle. Mr. Shaw testified that the axle could not have caused the car to slow down as alleged by the Petitioner. Based on his experience, Mr. Shaw testified that if the axle had locked, it would have stayed locked and would have been found to have been locked after the incident. However, the Petitioner testified that after the accident he had no problem moving the car forward and backward. Therefore, it is clear that since the axle did not continue to lock the axle could not have been the cause of the accident.

This evidence was left un-rebutted by Petitioner, although he had employed and retained an automotive expert. However, Petitioner never called his expert as a witness at trial.

Mr. Kenneth Kikta, who had forty (40) years experience as an automotive mechanic and who was employed as the Service Manager of Dan Buckeye Ford was subpoenaed by Respondent CONSOLIDATED RAIL CORPORATION

as a witness at trial. He examined Car 360 immediately after the claimed accident.

Mr. Kikta testified at trial, that he performed a number of tasks with regard to Car 360, including but not limited to disassembling the differential, examining the drive shaft, examining the brakes, and personally test driving Car 360. Mr. Kikta testified that after taking apart the drive train and examining it, as well as test driving the car, he could find no explanation for the vehicle allegedly coming to an abrupt stop, nor had he heard any noise coming from under the car. Mr. Kikta testified that after he conducted his full inspection of the car, he concluded that he could find no cause or explanation for the complaint regarding the movement of the car at the time of the alleged occurrence.

The aforementioned tests and inspections were performed within twenty-four (24) hours of Petitioner's alleged accident. Subsequent to the accident and prior to these tests and inspections by Mr. Kikta, no one performed any repairs on Car 360. At the time of Mr. Kikta's inspection and tests, Car 360 was in an identical condition as it was when the accident occurred on March 6, 1984. Mr. Kikta's compelling testimony illustrates that there was nothing wrong with Car 360. There was no evidence or indication that the Car came to a sudden stop or what would have caused the Car to come to a sudden stop.

In his Petition, the Petitioner admits he did not identify the cause of the Car acting as claimed, but opines it was fair to infer that the accident was caused by Respondent CONSOLIDATED RAIL CORPORATION using a

three (3) year old car or the alleged failure to check out complaints. Such total speculation is not enough to sustain a jury verdict. In fact, the evidence adduced at trial, through the documentary evidence of the maintenance records on Car 360 and the testimony of Douglas Mindek, Captain Albert Price and Captain Joseph Geng demonstrated that the Car was checked and repaired as necessary.

Incredulously, the jury returned a verdict for the Petitioner, found no comparative negligence on the part of Petitioner and found no liability on the part of the Respondent EXCELSIOR TRUCK LEASING COMPANY.[4] The record was devoid of any evidence of causation. The Courts Below correctly held that because of such, the evidence was insufficient as a matter of law to hold Respondent CONSOLIDATED RAIL CORPORATION liable and that Petitioner had failed to make out a prima facie case.

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[4] Respondent CONSOLIDATED RAIL CORPORATION asserted to the Appellate Division, First Department that the verdict was arrived at in whole or in part due to totally improper summation on the part of the Petitioner's trial attorney, including his giving unsworn testimony, expressing his own belief as to the facts, and reference to the "Bensonhurst thing" [a particularly troubling racial incident that occurred in Brooklyn, New York before the trial herein], when Respondent CONSOLIDATED RAIL CORPORATION's trial attorney was Black. The Courts Below did not address these issues as the Complaint was dismissed as a matter of law for failure to make a prima facie case.

REASONS FOR DENYING THE WRIT

At trial, Petitioner failed to establish a prima facie case against Respondent CONSOLIDATED RAIL CORPORATION because Petitioner failed to adduce evidence to causally connect in any way Petitioner's injury to any negligent act of the employer, CONSOLIDATED RAIL CORPORATION. A jury verdict based totally on speculation cannot stand. The Courts Below correctly relied on the Supreme Court holding in *Atchison Topeka and Santa Fe Ry. Co. v. Toops*, 281 U.S. 351 (1930). Post-*Toops* decisions of this Court did not erode the applicability of the *Toops* holding relied on in this case. Congress, in enacting the Federal Employers' Liability Act, did not intend to require Respondent CONSOLIDATED RAIL CORPORATION to act as an absolute insurer of any injuries sustained by its employees. To reverse the Court of Appeals of the State of New York in this matter would be to hold Respondent CONSOLIDATED RAIL CORPORATION liable for any and all injuries regardless of negligence or cause.

POINT I

PETITIONER FAILED TO PROVIDE SUFFICIENT EVIDENCE TO CAUSALLY CONNECT PETITIONER'S INJURY TO ANY NEGLIGENT ACT BY RESPONDENT CONSOLIDATED RAIL CORPORATION; THEREFORE, PETITIONER FAILED TO ESTABLISH A PRIMA FACIE CASE

The Complaint of the Petitioner herein was appropriately dismissed. The Petitioner, in attempting to convince this Court to grant a Writ of Certiorari, is pressing his contention that a jury verdict for the Petitioner should

stand even if it is based on total surmise, conjecture, assertions of hope and speculation. Such a contention is totally lacking in merit. Petitioner falsely asserts that the holding in *Toops*, is too broad and that the ruling relied upon by the Courts Below is nothing more than dicta.

In his Petition, Petitioner is repeating the same arguments that the vast majority of the judges of the Court of Appeals of the State of New York and the vast majority of the justices of Appellate Division First Department rejected. Petitioner repeats its claims that subsequent Supreme Court decisions have lessened the standard of review in Federal Employers' Liability Act cases and that the majority of the justices of the Appellate Courts neglected to abide by the rules set forth in post-*Toops* decisions. Petitioner further asserts that the majority of the justices of the Courts Below were irresponsible in not abiding to this Court's decision in *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, *reh'g denied*, 353 U.S. 943 (1957). (Petition P. 27)

Respondent CONSOLIDATED RAIL CORPORATION is dismayed at Petitioner's claim that the majority of justices in the Courts Below did not carefully consider Petitioner's appeal and that the majority of the judges and justices of the Courts ignored the precedent Supreme Court cases regarding Federal Employers' Liability Act actions.

It is very evident from reading the decisions by the majority of the judges and justices of the Courts Below that they were fully aware of the standard of review required in actions brought under the Federal Employers' Liability Act. In their respective decisions, the Courts

Below correctly reiterated that the standard in Federal Employers' Liability Act actions is "whether the proofs justify *with reason* the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought". [Emphasis Added.] *Rogers, supra.* (See: Petition Pages A2 and A25)

Therefore, the Courts Below did not overlook or misapply any controlling principle of law relating to Federal Employers' Liability Act actions. The Courts were fully aware of the standard of review in Federal Employers' Liability Act cases.

Furthermore, Petitioner falsely asserts that in Federal Employers' Liability Act actions, a party does not have to produce sufficient evidence to causally connect Petitioner's injury to any negligent act of Respondent CONSOLIDATED RAIL CORPORATION. Also, Petitioner falsely contends that in Federal Employers' Liability Act actions, a jury's verdict can be based on total surmise, speculation and conjecture. Such contentions are a misinterpretation of the holding of this Court in *Toops* and the subsequent holdings by this Court.

The Petitioner spends much time in his Petition seeking to argue that the Courts Below erred in citing *Toops* and that the provisions of that case should be considered non-binding dicta. (Petition P. 18.)

The Supreme Court in *Toops* held:

> To recover under the Federal Employers' Liability Act, an employee must prove the employer's negligence and that the alleged negligence is a proximate cause of the employee's

> injury. In a case under the Federal Employers' Liability Act, a court cannot allow a jury to **speculate** concerning the cause of an employee's injuries and must withhold or withdraw the employee's case from the jury unless evidence proves a basis for the reasonable inference that the employee's injury was caused by the employer's negligence. [Emphasis added.]

Id. at 354-355.

Respondent CONSOLIDATED RAIL CORPORATION is perplexed as to the Petitioner's meritless claim that subsequent to *Toops* the Supreme Court has held that a jury verdict can be based on total speculation, surmise or conjecture. The Petitioner relies on *Gallick v. Baltimore & Ohio R. Co.*, 372 U.S. 108 (1963); *Lavender v. Kurn*, 327 U.S. 645 (1946); *Schulz v. Pennsylvania R. Co.*, 350 U.S. 523 (1956); *Webb v. Illinois Central R. Co.*, 352 U.S. 512 (1957) for such a proposition. Petitioner ignores other case law which has held that there must be sufficient evidence to causally connect an employee's injury to any negligent act by the employer.

Courts have continued to hold that in Federal Employers' Liability Act actions, there must be a sufficient showing (i.e., more than a possibility) that a causal relation existed. In *Tennant v. Peoria & Pekin Union Railway Co.*, 321 U.S. 29, 32-33 (1943), Mr. Justice Murphy stated:

> Petitioner was required to present probative facts from which the negligence and the causal relation could reasonably be inferred. The essential requirement is that mere speculation be not allowed to do duty for probative facts after making due allowance for all reasonably possible inferences favoring the party whose case is

attacked. *Galloway v. United States*, 319 U.S. 372 (1943); *Atchison T. & S.F. Ry. Co. v. Toops*, 281 U.S. 351 (1930).

Furthermore, the Supreme Court in *Brady v. Southern Ry. Co.*, 320 U.S. 476 (1943) affirmed the reversal of a jury verdict in a Federal Employers' Liability Act case. In *Brady*, Mr. Justice Reed stated:

> The weight of the evidence under the Employers' Liability Act must be more than a scintilla before the case may be properly left to the discretion of the trier of the fact in this case, the jury. * * * When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims.

Id. at 479-480.

See also Fore v. Southern Ry. Co., 178 F.2d 349 (4th Cir. 1949).

In *Moore v. Chesapeake & O. Ry. Co.*, 340 U.S. 573 (1951), this Court, in an opinion by Mr. Justice Minton, held that evidence was insufficient to present a question for the jury as to whether defendant's engineer was negligent in making a sudden and unexpected stop, without warning, thereby causing plaintiff's decedent to be thrown from the footboard of an engine tender into the path of a train. The Court held that it was incumbent

upon plaintiff to prove negligence of defendant which caused the fatal accident and that speculation cannot supply place of proof. *Id.* at 578

Moreover, in *Kuberski v. New York Cent. R.R. Co.*, 359 F.2d 90 (2nd Cir. 1966), *cert. denied*, 386 U.S. 1036 (1967), the Court held that a railroad car inspector suing a railroad under the Federal Employers' Liability Act, for injuries sustained while inspecting cars, failed to sustain the burden of proving that employer's alleged negligence in failing to have a motor scooter supplied with door closing equipment accompany him at time of injury played any role whatsoever in producing the injuries sustained. The Court held that since the record is devoid of evidence tending to show that the equipment on which the plaintiff stepped was defective, the court should not sustain verdicts that can only be based on speculation. *Id.* at 93

Even more recently, the Supreme Court of the State of Nebraska in *Chapman v. Union Pacific Railroad*, 237 Neb. 617, 467 N.W.2d 388 (1991), sustained the trial court's directed verdict on Plaintiff's Federal Employers' Liability Act claim. The plaintiff had claimed that his injuries could have been reduced or prevented had the railroad installed a seatbelt shoulder harness in a particular motor vehicle. The Court, citing *Toops*, held that under the Federal Employers' Liability Act, the railroad was not liable for injuries sustained by a railroad employee.

In the Case at Bar, it is clear that the Court of Appeals of the State of New York, after careful consideration of all applicable case law, came to the conclusion that Petitioner had failed to satisfy the standard of review applicable to

Federal Employers' Liability Act actions. The Court of Appeals stated:

> Even under the "low and liberal" standard applicable to FELA cases (*Smith v. National R.R. Passenger Corp.*, 856 F.2d 467, 469 (2nd Cir. 1988), plaintiff's evidence is insufficient as a matter of law, without total speculation (*Atchison, Topeka & Santa Fe Ry. Co. v. Toops*, supra at 355) to permit the inference that any negligent act or omission on Conrail's part caused his injuries.

(Petition A.3)

Petitioner's claims are based solely on the fact that he was injured. However, the bare occurrence of an injury alone cannot provide evidence of negligence and proximate causation necessary to allow the case to go to the jury. *Kuberski* at 93; *See also Moore*, 340 U.S. at 577-578. Furthermore, an employee's own conclusory assertions of negligence, absent proof of specific facts, are insufficient to support a rational inference of negligence. *Hurley v. Patapsco & Back Rivers R.R. Co.*, 888 F.2d 327, 329 (4th Cir. 1989).

Petitioner at trial offered no specific evidence as to the cause of accident. Petitioner testified that Car 360 skidded and then rolled to a stop on the side of the highway. No other vehicles were involved. The car did not strike any objects. The accident was unwitnessed. The Petitioner was unable to give any specific reason, other than speculation, guess or conjecture as to the cause of the alleged accident. Petitioner's basis for alleging liability on the part of Respondent CONSOLIDATED RAIL CORPORATION is that he was injured.

Even Petitioner herein concedes and admits that Petitioner at trial could not identify the precise cause. In fact, Petitioner could not identify any cause for the alleged incident. (Petition P. 8.) Petitioner offered no evidence that he made any oral complaints to any of Respondent CONSOLIDATED RAIL CORPORATION's supervisory personnel concerning Car 360. The Petitioner offered no corroborative evidence of his self-serving claim that he had orally complained about rear noise on Car 360 to co-employees. However, Respondent CONSOLIDATED RAIL CORPORATION did provide corroborative evidence that neither Petitioner nor Officer Libruk made any oral complaints to their immediate supervisor. At the trial, Lieutenant Albert Price, who supervised both the Petitioner and Officer Libruk, testified that prior to March 6, 1984, neither the Petitioner nor Officer Libruk ever communicated any specific complaints with respect to Car 360.

As the Courts Below indicated, Petitioner's evidence primarily consisted of testimony that Car 360 allegedly had been frequently complained about and repaired, was three (3) years old and had allegedly had been driven many thousands of miles. Petitioner's failure to establish a prima facie case against Respondent CONSOLIDATED RAIL CORPORATION can be evidenced by Petitioner's testimony at trial as to the error free operation of the Car before and after the accident highlighted earlier.

In *Moody v. Marine Central Railroad Company,* 823 F.2d 693, 695-696 (1st Cir. 1987), the Court held that expert evidence is often required to establish a causal connection between the accident and some item of physical or mental injury unless the connection is a kind that would be

obvious to laymen, such as a broken leg from being struck by an automobile. (quoting 4 F. Harper, F. James & O. Gray, *The Law of Torts* § 20.2 2d ed. 1986).

This general principle is also stated by Prosser and Keeton.

> Where the conclusion [of causation] is not one within common knowledge, expert testimony may provide a sufficient basis for it, but in the absence of such testimony it may not be drawn.

W.P. Keeton, *The Law of Torts* 269 (5th ed. 1984) (footnotes omitted).

In the instant case, Petitioner asked the jury to speculate that the accident was caused by the alleged non-repair or the alleged defective condition of the car. Petitioner failed to introduce any expert witness to either testify as to the specific cause of the alleged incident or offer any evidence relating to any alleged defect in Car 360. Petitioner cannot even identify the part allegedly not repaired nor can he identify a defective condition.

Respondent CONSOLIDATED RAIL CORPORATION, on the other hand, offered expert testimony by Mr. Shaw, an engineer employed by Ford Motor Company, that the accident could not have occurred as alleged as a matter of engineering certainty and physical science. Furthermore, Mr. Kenneth Kikta definitively concluded that there was nothing wrong with Car 360 which would cause it to move in the fashion alleged by the Petitioner.

The Petitioner offered absolutely no evidence to the jury, either on his own or through his own witnesses that

any specific or identified defect caused the alleged movement of Car 360. Petitioner submitted no evidence to the jury to enable a determination that Respondent CONSOLIDATED RAIL CORPORATION's act or omissions were a proximate cause of this occurrence. The verdict in this matter was based on total speculation and could not stand. A jury finding based on total speculation is not sustainable. It was properly dismissed.

POINT II

POST-*TOOPS* DECISIONS SUCH AS *GALLICK, TENNANT, LAVENDER* AND *BASHAM* ARE DISTINGUISHABLE FROM THE CASE AT BAR

Petitioner mistakenly relies heavily on his belief that this case is no longer controlled by *Toops* and that post-*Toops* decisions should have been followed by the Courts Below. The post-*Toops* decisions relied on by Petitioner are easily distinguishable.

In the instant case, there is absolutely no evidence to justify the jury's determination that the employer's negligence played any role whatsoever in producing the harm the employee suffered. Petitioner's reliance on post-*Toops* decisions such as *Gallick, Tennant, Lavender* and *Basham v. Pennsylvania R. Co.*, 372 U.S. 699 (1963) is without merit. Inasmuch as these Federal Employers' Liability Act cases cited by the Petitioner are distinguishable from this case, this Court should deny Petitioner's Writ for Certiorari.

In *Lavender v. Kurn*, 327 U.S. 645 (1946), there were facts in the record to support the reasonable inference that decedent was struck and killed by a mail hook protruding from a train. However, it is interesting to note,

that in relying on *Lavender*, the Petitioner has failed to bring to this Court's attention, the quote which most nearly involves the facts in this case: " . . . when there is a complete absence of probative facts to support the conclusion reached," the jury finding is reversible. *Id.* at 653. In the instant case, the Courts Below held that there was a total lack of or absence of any probative facts on the issue of causation.

Similarly in *Gallick v. Baltimore & Ohio R.R. Co.*, 372 U.S. 108 (1963) an expert testified that stagnant, vermin infested pools, tend to attract and breed insects of the type which caused his injury. In the Case at Bar, Petitioner failed to submit any expert evidence establishing any facts upon which liability could be based.

Basham v. Pennsylvania R. Co., 372 U.S. 699 (1963) is also of no assistance to the Petitioner, because there was direct eyewitness testimony that the accident occurred as plaintiff claimed. Here, there was no eyewitness to the alleged accident that could confirm Petitioner's self-serving testimony as to how the alleged incident occurred.

Petitioner's reliance on *Tennant* is misplaced and in fact demonstrates that *Toops* is still good law. The Court therein, citing *Toops*, held that "mere speculation be not allowed to do duty for probative facts". *Tennant* at 32. In this case, the Courts Below found no probative facts and there was insufficient evidence to find any causal connection.

Petitioner has built a house by using speculation and conjecture. Petitioner relied on the jury speculation that there must have been something wrong with an unknown part of the vehicle which may have caused the accident.

This Court in its decisions in *Toops, Brady, Tennant,* and *Moore* have rejected the idea that jury verdicts based on total speculation, conjecture or surmise should be upheld. Petitioner has failed to present evidence from which the negligence and the causal relation could reasonably be inferred.

Therefore, because the evidence presented does not suggest the conclusion that employer negligence played any part, even the slightest, in producing the injury, the Petitioner's Writ of Certiorari should be denied and the decisions by the Courts Below should stand.

POINT III

CONGRESS DID NOT INTEND TO MAKE RESPONDENT CONSOLIDATED RAIL CORPORATION AN ABSOLUTE INSURER AGAINST PERSONAL INJURY DAMAGES SUFFERED BY ITS EMPLOYEES

This Court has made it clear in its decisions, that under the Federal Employers' Liability Act the employer is not an insurer and that the injured employee can recover only upon proof of negligence on the part of the employer which is the proximate cause of the injury to the employee. In *Wilkerson v. McCarthy,* 336 U.S. 53, 61 (1949), Mr. Justice Black said:

> Much of respondents' argument here is devoted to the proposition that the Federal Act does not make the railroad an absolute insurer against personal injury damages suffered by its employees. *That proposition is correct,* since the Act imposes liability only for negligent injuries. [Emphasis added.]

See *Myers v. Reading Co.,* 331 U.S. 477 (1947).

Furthermore, in *Heater v. Chesapeake & O. R. Co.*, 497 F.2d 1243, *cert. denied*, 419 U.S. 1013 (1974), the Court held that Federal Employers' Liability Act does not make the employer an insurer, and that to recover plaintiff must show causation.

Therefore, it is clear that Congress did not intend to make a railroad liable for any and all injuries to its employees. In order to recover, a railroad employee has a duty to provide probative proof of negligence and causation on the part of the employer. Respondent CONSOLIDATED RAIL CORPORATION is perplexed as to Petitioner's meritless claim that a railroad should be held liable just because an employee was injured. Such a theory would result in Respondent CONSOLIDATED RAIL CORPORATION to be held liable for any injuries to its employees. Congress in enacting Federal Employers' Liability Act, intended to hold an employer liable only if an employee provides sufficient evidence to causally connect his injury to any negligent act of the employer.

After careful examination of case law and statutory law, nine (9) of the eleven (11) justices hearing this case in the Courts Below held that Petitioner failed to provide sufficient evidence to prove causation. Petitioner, however, claims that the Courts Below were irresponsible in relying on *Toops* and the controlling case. Petitioner falsely accuses the judges and justices of the Courts Below in misapplying the controlling cases.

Respondent CONSOLIDATED RAIL CORPORATION is astonished at the harsh tone which the Petitioner has adopted to refer to the Courts Below throughout the

Petition. Petitioner's harsh tones can be found throughout the Petition. For example, on Page 29 Petitioner states that with this decision, the judges of the New York Court of Appeals were apparently mocking and defying the Supreme Court's authority. Furthermore, Petitioner states that the judges "trifled" with their obligations. Perhaps the Petitioner relies on these harsh tones, since he realizes the case law upon which he relies is uncompelling.

It is incomprehensible for the Petitioner to even suggest that the Judges defied the Supreme Court's authority and had failed to carefully consider this appeal. The Courts Below based their decisions on reviewing Supreme Court precedents such as *Rogers* and *Toops*. Therefore, it is clear that the Courts Below did not ignore Supreme Court precedents when they held that Petitioner had failed to establish a prima facie case against Respondent CONSOLIDATED RAIL CORPORATION.

CONCLUSION

FOR THESE REASONS, THIS COURT MUST DENY THE PETITION FOR A WRIT OF CERTIORARI AND PERMIT THE DECISION AND ORDER OF THE COURT OF APPEALS OF THE STATE OF NEW YORK TO STAND.

Respectfully submitted,

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April 28, 1993
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APPENDIX A

AFFILIATED CORPORATIONS OF THE DEFENDANT-RESPONDENT CONSOLIDATED RAILROAD CORPORATION

AKRON & BARBERTON BELT R.R. CO.

ALBANY PORT RAILROAD CORP.

BELT RAILWAY CO. OF CHICAGO

CALPRO COMPANY

CALUMET WESTERN RAILWAY CO.

CHICAGO & WESTERN INDIANA RWY. CO.

CRC PROPERTIES, INC.

CRR INDUSTRIES, INC.

INDIANA HARBOR BELT R.R. CO.

LAKEFRONT DOCK & R.R. TERM. CO.

MERCHANTS DESP. TRANS. CORP.

MONONGAHELA RAILWAY CO.

NICH., FAY., & GREENB. R.R. CO.

PENN CENTRAL COMMUNICATIONS CO.

PEORIA MIDWEST TRANSP. CORP.

PEORIA & PEKIN UNION RWY. CO.

PITTS., CHART., & YOUGH. RWY. CO.

RAILBOX COMPANY

RAILGON COMPANY

RAILROAD ASSOC. INSURANCE, LTD.

ST. LAWRENCE & ADIRON RWY. CO.

TRAILER TRAIN CO.

TRANSPORTATION DATA EXCHANGE, INC.

BLACK HAWK DEVELOPMENT, INC.

CG PROJECTS, INC.

CG LOCKPORT

CONCORD CANADA, INC.

CONCORD RESOURCES GROUP

CONRAIL MERCURY, INC.

CRR CREDIT CORP.

CRR INVESTMENTS, INC.

CR QUALITY SERVICES, INC.

CU ENERGY PARTNERSHIP LP

GENERAL AMERICAN INSURANCE CO.

INCINERATOR PROJ JOINT VENTURE

LAND ACQUISITION SERVICES, INC.

NY LAND ACQUISITION SERVICES, INC.

PD LAND SERVICES, INC.

SORETOX INC.

STABLEX CANADA, INC.

STABLEX FILTRATION, INC.

Supreme Court, U.S.
FILED
APR 30 1993
OFFICE OF THE CLERK

No. 92-1598

IN THE

Supreme Court of the United States

October Term, 1992

THOMAS W. CURLEY,

Petitioner,

against

CONSOLIDATED RAIL CORPORATION and EXCELSIOR TRUCK LEASING COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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(9844—LC9-681—1993)

QUESTION PRESENTED

Was it error for the New York Court of Appeals to affirm the Appellate Division's ruling which vacated a jury verdict and judgment in petitioner's favor on the grounds that, as a matter of law, the evidence was insufficient, without total speculation, to permit the inference that any negligent act or omission on Conrail's part caused petitioner's injuries.

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Tennant v. Peroria & Pekin Union R. Co., 321 U.S. 29 (1943) 9, 16

STATEMENT OF THE CASE

Due to several misstatements of fact in petitioner's "Statement of the Case", we will here set forth the salient facts based upon the record.

On March 6, 1984, petitioner was employed by respondent Consolidated Rail Corporation (hereinafter referred to as "Conrail") as a police officer. Petitioner testified that while on routine patrol in Rockland County, New York, the 1981 Ford LTD police car he was driving suddenly decelerated and came to an abrupt stop. Petitioner testified that although wearing a seat belt and shoulder harness, the vehicle's abrupt stop caused him to injure his back.

Petitioner commenced an action against Conrail for personal injuries under the Federal Employers' Liability Act based upon the alleged negligence of Conrail in failing to properly service and maintain its vehicle which

failure was the proximate cause of petitioner's injuries. Conrail commenced a third-party action against Ford Motor Company and respondent, Excelsior Truck Leasing Company (hereinafter referred to as "Excelsior") for breach of contract and negligence. The third-party action against Ford Motor Company was discontinued before trial.

The vehicle in question was leased to Conrail by Excelsior in July, 1981 for a term of two years. The alleged incident occurred subsequent to the expiration of the two year lease. The evidence at the trial showed that during the extended lease period, the primary responsibility for servicing the vehicle was Conrail's.

While the petitioner testified that several days prior to the alleged accident, he heard noises coming from the undercarriage of the vehicle and petitioner's fellow officer, James Libruk testified that approximately one year before the alleged accident the vehicle had come to an abrupt

stop, all of the other evidence at the trial, not only contradicted this testimony, but rendered it wholly and completely incredible. The petition asserts that the New York Court of Appeals failed to consider "evidence" adduced during the cross examination of the two expert witnesses called by Conrail. On page 6 of the petition the following language appears:

> Despite their direct testimony supportive of Conrail's position, on cross examination both witnesses made critical concessions indicating that this accident could well have occurred as petitioner claimed. Thus, the service manager admitted that the sudden stopping of the car could have been caused by pieces breaking off and jamming in the differential or in the transmission, or the emergency brake having accidentally engaged. He admitted that he had not inspected the transmission or the emergency brake cable . . .
>
> . . . He specifically [the Ford engineer] conceded that if a part had broken off and jammed in the gears of the differential, this could have caused the car to act as petitioner claimed it had.

While both expert witnesses indeed testified that it is possible for a vehicle to suddenly decelerate if a gear or other part breaks off and jams in the transmission or differential, in each case the cross examiner interrupted the answer of the expert and would not let him finish his answer. On redirect, each expert testified that if such an event occurred, the jam up or siezing of the transmission or differential which caused the deceleration would continue until repaired. Neither the transmission nor the differential could correct itself as it would appear from petitioner's testimony. Petitioner testified that, without warning the vehicle suddenly decelerated and then rolled to a stop. He further testified that he drove the car forward and backward while waiting for the tow truck without any recurrence of the problem.

Based upon all of the credible evidence, the New York Court of Appeals, and the Appellate Division before

that, found that there was insufficient evidence as a matter of law, without total speculation, to permit the inference that any negligent act or omission on Conrail's part caused petitioner's injuries.

The New York State Appellate courts did not ignore the precedents of this Court in arriving at their decisions. Each specifically found that the total failure of the evidence establishing negligence or a causal connection between any act or omission on the part of Conrail and petitioner's injuries mandated a reversal of the jury verdict, even under the liberal standard set by this Court in FELA cases. Except for the testimony of petitioner, there was no evidence whatsoever that he was actually injured on the job on March 6, 1984, that the automobile behaved in the way petitioner alleged or indeed that there was any mechanical problem with the vehicle whatsoever. It is the utter absence of proof that

compelled the New York Appellate courts to reverse the jury's finding in this case.

REASONS FOR DENYING THE WRIT

The Proofs Failed To Justify With Reason The Conclusion That Employer Negligence Played Any Part In Producing Petitioner's Injuries.

The petition discusses at length this Court's decisions in FELA negligence cases subsequent to its decision in Atchison, Topeka & Santa Fe R. Co. v. Toops, 281 U.S. 351 (1930). For the most part, petitioner's discussions of these FELA decisions is accurate in that the petition fairly sets forth the holdings in each case. We submit however that the petition misses the mark in applying those decisions to the facts in the case at bar. More troublesome, however, is petitioner's characterization of the decision and motive of the New York Court of Appeals in affirming the reversal of the jury's verdict. It is regrettable that petitioner misrepresents the holdings of the New York Appellate

courts in his desperate attempt to get one more bite at the apple. As will be shown below, both the Appellate Division and the New York Court of Appeals carefully considered the standard of proof in FELA cases as enunciated in this Court's decisions, but nonetheless found, as a matter of law, that the evidence was insufficient to justify an inference that any act or omission on the part of Conrail caused petitioner's injuries.

The case at bar, as with all of the FELA negligence cases cited by petitioner, involves the question of whether there was evidence that any employer negligence caused the employee's injuries or more precisely, sufficient evidence to justify a jury's determination that employer negligence played any role in producing the injuries. Gallick v. Baltimore & Ohio R. Co., 372 U.S. 108, 116 (1963). See also Rogers v. Missouri Pacific R. Co., 352 U.S. 500, 506 (1957) in which this Court stated:

> Under [FELA] the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury . . . Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury . . . (emphasis added)

The phrase "with reason" emphasized in the foregoing quotation clearly indicates an expression by this Court that the evidence causally connecting a negligent act or omission of the employer to the injuries of the employee must not be based upon pure speculation. We submit that the evidence adduced at the trial in the case at bar precludes an inference, with reason, that any act or omission on the part of Conrail was the cause of petitioner's injuries. In Tennant v. Peroria & Pekin Union R. Co., 321 U.S. 29, 32 (1943) this Court set forth the following test for causality in FELA negligence cases:

> In order to recover under the Federal Employers' Liability Act, it was incumbent upon petitioner to prove that respondent was negligent and that such negligence was the proximate cause in whole or in part of the fatal accident . . . Petitioner was required to present probative facts from which the negligence and the causal relation could reasonably be inferred. "The essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked." . . . If that requirement is met . . . the issues may properly be presented to the jury. (emphasis added)

Petitioner would have this Court believe that the necessary conclusion to be drawn from this Court's post-Toops decisions is that there is no standard of proof in FELA negligence cases and that a jury verdict may in fact be based totally upon speculation. Indeed, if one were to adopt petitioner's statement of the law on this issue, it would be difficult if not impossible to posit a set of facts which would justify a court from taking a FELA negligence

case from a jury. We respectfully submit that such is simply not the law.

In Lavender v. Kurn, 327 U.S. 645, 653 (1945), this Court addressed the issue of jury speculation in FELA negligence cases. In Lavender an employee was found injured on the track bed suffering from a fractured skull from which he subsequently died without regaining consciousness. There were no witnesses to the accident. Plaintiff produced "proof" that it was possible that the injury occurred when a mail hook, under extraordinary conditions, could have struck the employee while a train was backing up. There was contradictory "proof" that, due to the height of the hook in relation to the height of the employee while standing at various elevations it would be impossible to have occurred as alleged by the plaintiff. The jury returned a verdict in favor of the

plaintiff. This Court affirmed by stating at Id., 327 U.S. 653:

> It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. (emphasis added)

The facts in the case at bar differ significantly from the cases decided by this Court which are relied upon by petitioner. In this case, the only evidence to support petitioner's version of the accident is his own testimony that he "believed" the wheels locked which allegedly caused him to fall forward and hurt his back

notwithstanding the seat belt and shoulder harness. However, on cross examination, as pointed out by the Appellate Division (A29), petitioner admitted that after the accident and before the tow truck arrived, petitioner believes that he moved the automobile forward and backward without any apparent difficulty. No skid marks were found at the site of the accident.

Conrail called two experts, the Service Manager at the Ford dealership which serviced the car and an engineer from Ford Motor Company. Notwithstanding petitioner's distortion of the testimony of these individuals, it is clear that their testimony renders petitioner's testimony incredible as a matter of law.

The Service Manager who inspected the automobile, hours after the accident, Mr. Kenneth Kikta, testified unequivocally that he took the car for a test drive and found no malfunctions whatsoever and that later that

day the drive-train and brake system were disassembled and inspected and found to be in working order, i.e., nothing was found which would explain the sudden deceleration alleged by the plaintiff. Petitioner falsely states that Mr. Kikta failed to inspect the emergency brake cable whereas in truth, as reflected in the record, Mr. Kikta testified that he had in fact inspected the cable and it was in working order. When Mr. Kikta was asked if it were possible for the car to suddenly decelerate if a damaged or worn part in the transmission or differential broke loose and jammed the mechanism, Mr. Kikta answered in the negative. Mr. Kikta testified that he personally inspected the differential and there was no such damage and that if such an event had occurred with the transmission, which he did not disassemble, it would not cause the car to decelerate, but rather would cause the transmission to slip, i.e., to roll free rather than come

to an abrupt stop. Mr. Kikta clearly indicated, however that in such an event the transmission would not right itself, but would remain in that condition.

When the Ford engineer, Mr. Thomas Shaw, was asked whether the accident could possibly have occurred as described by petitioner, he answered "my opinion is that there was no mechanical deficiency and that there was no accident". Mr. Shaw, who has extensive experience in the design of the transmission, differential, axles and other components of the drive-train on the model Ford LTD in question, further testified that had a worn or broken part broken off and jammed either the transmission or the differential thereby causing the axle to lock, it would have stayed locked and would have been found to have been locked until it was repaired. He further testified that, due to the engineering of the automobile in question and its specific center of gravity,

"nothing would have slowed the car down like [petitioner claimed]".

No other fact supports petitioner's claim as to the cause of the accident, not even his own records maintained in connection with the operation of the vehicle. Simply put, all of the evidence adduced at the trial, save for petitioner's own testimony, precludes an inference that any act or omission on the part of Conrail caused, even to the slightest degree, petitioner's injuries. Indeed, the only evidence that would indicate that petitioner's back injury occurred on the day in question is his own testimony.

Based upon the foregoing, we respectfully submit that the facts in the case at bar are clearly distinguishable from the facts in this Court's FELA decisions which are relied upon by petitioner. Tennant v. Peoria & Pekin Union R. Co., 321 U.S. 29 (1943) (employee struck by

train backing up without sounding warning bell required by employer's rules); Lavender v. Kurn, 327 U.S. 645 (1945) (employee found unconscious at track side with fractured skull with no witnesses and equally probative evidence presented that he was struck by mail hook on train or that he was murdered); Schultz v. Pennsylvania R. Co., 350 U.S. 523 (1955) (employee drowned while working on docked tug boats which were poorly lit and covered with ice); Rogers v. Missouri P. R. Co., 352 U.S. 500 (1957) (employee, after setting fire to weeds to clear track bed, was injured when he fell in retreat from flames which were fanned by a passing train); Gallick v. Baltimore & Ohio R. Co., 372 U.S. 108 (1963) (employee developed severe complications from insect bite at a pool of stagnant water containing dead and decaying rats and pigeons, which condition had been permitted to exist by the employer for many years); Basham v. Pennsylvania R.

Co., 372 U.S. 699 (1963) (employee suffered injuries consisting of amputation of a finger caused by his dropping a 100 pound wheel spring on his finger immediately after the platform on which he was working moved).

In all of the foregoing cases, the inferences which could be drawn from the evidence, both those supporting plaintiff's case and contradicting it, were of similar or equal probative weight. In the case at bar, we respectfully submit that the overwhelming evidence which was uncontradicted, precludes as a matter of law, an inference that any act or omission on the part of Conrail contributed, even to the slightest degree, to the petitioner's injury. We further submit, given the facts in the case at bar, were petitioner to succeed, this Court would effectively rule that there is no standard of proof required of a plaintiff in a FELA case in establishing

negligence on the part of the employer and a causal connection between the negligence and petitioner's injuries.

We respectfully submit based upon the foregoing that the New York Appellate courts did not commit error in usurping the jury's function in this case. Both the Appellate Division and the New York Court of Appeals properly found that as a matter of law, the evidence was insufficient to justify an inference that any act or omission on the part of Conrail contributed, even to the slightest degree, to petitioner's injuries.

We further submit that with this Court's crushing case load, granting a writ of certiorari in this case would constitute a waste of this Court's precious time and resources. The words of Justice Frankfurter in Rogers v. Missouri Pacific R. Co., 352 U.S. 500, 532, 537 are as true today as they were then, viz.:

> Of course, cases raising questions that are not evidentiary, questions that fairly involve the construction or scope of the statute are appropriate for review here . . . But the ordinary negligence case under the Federal Employers' Liability Act does not satisfy the criteria that define the "special and important reasons" when a writ of certiorari will be granted . . .
>
> * * *
>
> In any event, the Court in these four cases has merely reviewed evidence that has already been reviewed by two lower courts, and in so doing it ignores its own stricture to the bar that "We do not grant a certiorari to review evidence and discuss specific facts."

Also appropriate on this point are the words of Justice Harlan in Basham v. Pennsylvania R. Co. 372 U.S. 699, 701, viz:

> A total of 12 New York Judges - one at nisi prius, four on the Appellate Division (a fifth dissenting) and seven on the Court of

> Appeals - have held that the evidence was insufficient to warrant submission of the case to the jury.[1]
>
> To bring such a case here for further review by nine more Justices seems to me a most futile expenditure of judicial time. Having reflected on the oral argument, briefs and record, I conclude that the only premise on which this reversal can be justified is that anything a jury says goes.

While Justices Frankfurter and Harlan were speaking in dissenting opinions, we submit that their words ring true today in this case. The record does not support the petition herein. Petitioner is merely seeking one further bite at the apple.

For all of the foregoing reasons, we respectfully submit that the writ should not be granted.

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[1] In the case at bar, 11 Judges have so held-five in the Appellate Division (the dissenting Judge agreed on this point) and six in the Court of Appeals, with one dissenting.

CONCLUSION

The New York Appellate courts correctly applied the law as enunciated by this Court, in holding, on these facts, that the evidence was insufficient, as a matter of law, to justify an inference that any act or omission by Conrail played any part in petitioner's injury.

Respectfully submitted,

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April 30, 1993

STATEMENT OF CORPORATE AFFILIATION

Excelsior Truck Leasing Company, the respondent third-party defendant, ceased doing business in April 1989. At that time it was the wholly owned subsidiary of S. L. Brown Co., 767 Fifth Avenue, New York, New York.

Supreme Court, U.S.
FILED
MAY 10 1992
OFFICE OF THE CLERK

No. 92-1598

IN THE
Supreme Court of the United States
October Term, 1992

THOMAS W. CURLEY,
Petitioner,

-against-

CONSOLIDATED RAIL CORPORATION and
EXCELSIOR TRUCK LEASING COMPANY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE NEW YORK COURT OF APPEALS

BRIEF IN REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

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1. "TOTAL SPECULATION," LIABILITY AS AN INSURER, AND LAVENDER AND BASHAM.

Petitioner has not urged that a FELA finding of liability can be based on "total speculation" or that this statute imposes insurer liability on an employer.

What we have urged with respect to speculation is only what this Court stated in Lavender v. Kurn, 327 U.S. 645 (1946), to wit: " It is no answer to say that the jury's verdict involved speculation and conjecture"; what matters is whether there are "probative facts" which support the jury's finding. Id., at 653. What counts is whether "fair minded men" could draw the inference of causation. Id.[1]

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[1] See also Webb v. Illinois Central R. Co., 352 U.S. 512, 515 n.6, reh. denied, 353 U.S. 943 (1957), revg 228 F.2d 257 (7th Cir. 1956).

Consistent with Lavender, our point is that, once the employer's negligence has been established by sufficient evidence, it is no proper objection to a jury finding of causation that such finding may have required some speculation. See, making the same point, 4 F.V. Harper, F.James & O.Gray, The Law of Torts (2d ed. 1986), Sec. 20.2, at 97-98.

Here, both New York appellate courts, like this jury and the trial court, were satisfied that there was sufficient evidence to find that Conrail was negligent. And, as to causation, there was in fact entirely sufficient evidence supporting this jury's finding of causation. That evidence included not only the circumstantial evidence tending to establish that this accident could, and quite likely did, occur as petitioner claimed it did, but also, as Judge Bellacosa noted in his dissent in the

Court of Appeals (see A14-15), this evidence included "direct" testimony, to wit, that of the petitioner himself, establishing that in fact this accident and his injury had occurred as he claimed they had. Compare Basham v. Pennsylvania R. Co., 372 U.S. 699 (1963).[2]

Plainly, under Basham and Lavender and this Court's other here controlling FELA precedents no impermissible speculation was required for this jury to find that Conrail's amply established negligence had caused petitioner's injury. All that this required was that the jury accept as true the petitioner's testimony as to how his injury had occurred, which this jury obviously did.

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[2] See also 4 F.V. Harper, F. James & O. Gray, The Law of Torts (2d ed. 1986), Sec. 20.2, at 93 n.7: "Thus, where there are eyewitnesses to an accident, their testimony will generally suffice to establish defendant's breach of duty and direct causation of plaintiff's injuries."

2. RESPONDENTS' MISREADING OF BASHAM AND THIS COURT'S OTHER FELA DECISIONS.

At page 18 of its brief Conrail states that Basham

> is of no assistance to Petitioner, because [in that case] there was direct eyewitness testimony that the accident occurred as plaintiff claimed. Here, there was no eyewitness to the alleged accident that could confirm Petitioner's self-serving testimony as to how the alleged incident occurred. [3]

With all respect, this is arrant nonsense. Basham does not either impose or recognize any " disinterested eye-witness" requirement. Rather, what Basham stands for is that it is for the jury to determine credibility and find the facts. See Edmonson v. Leesville Concrete Co., ___ U.S. ___, ___, 114 L.Ed.2d 660, 676, 111 S.Ct. 2077, 2085 (1991).

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[3] See also id. at 15, concerning petitioner's testimony as to his complaints concerning Car 360, and, to the same effect, Excelsior's brief at 5 and 13.

Appellate courts may not set aside a FELA jury finding of liability based on the fact that a critical part of the plaintiff's case was supplied by his own testimony. That would be directly contrary to what Basham stands for.

Conrail's suggested eyewitness corroboration requirement is inconsistent with what this Court has held as to the role of the jury in FELA cases. See Rogers v. Missouri Pacific R. Co., 352 U.S. 500, 507-509, reh. denied, 353 U.S. 943 (1957); see also Davis v. Baltimore & Ohio R. Co., 379 U.S. 671 (1965).

It is inconsistent with Rogers' holding that even circumstantial evidence is sufficient, without more, to establish a prima facie case. See 352 U.S., at 508, text and note 17. Further, such a rule is inconsistent with Rogers' and Lavender's teaching that all that is required to establish FELA causation is evidence

which a jury can "with reason" rely upon, without regard to the source or type of such evidence.

The fact of the matter is, as Judge Bellacosa pointed out (see A5 and A16-18), Basham is here controlling; it establishes that this jury was fully entitled to credit petitioner's testimony.

As to Conrail's argument that petitioner was required to establish the "precise" or "specific" cause of Car 360's sudden stopping (Conrail's brief at 14-15), suffice it to say, again Basham is controlling. Since in that case there was no proof concerning what might have caused the platform on which Basham had been working to move, Basham cannot be squared with any requirement that this petitioner had to prove the precise cause of Car 360's suddenly stopping.

Similarly, this Court's precedents

squarely refute Excelsior's argument (Brief at 18) that, in order for the evidence to be sufficient, "the inferences which could be drawn from the evidence, both those supporting plaintiff's case and contradicting it," must be of "similar or equal probative weight."

This argument ignores that many real world questions cannot be reduced to or determined on the basis of mathematical probabilities. It ignores that, as a matter of pragmatic necessity, issues of fact must be resolved by juries even when probabilities cannot be determined.[4]

More to the point, even, Excelsior's argument was rejected in Rogers. See 352 U.S., at 506:

> It does not matter that from

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[4] Compare Zinnel v. United States Shipping Board Emergency Fleet Corp., 10 F.2d 47, 49 (2d Cir.1925) (L. Hand, J.): ". . . nor are we justified, where certainty is impossible, in insisting upon it."

> the evidence the jury may also with reason, on grounds of probability, attribute the result to other causes ....

See also Tennant v. Peoria & P.U.R. Co., 321 U.S. 29, at 35 (1944); Gallick v. Baltimore & Ohio R. Co., 372 U.S. 108, at 114-115 (1963).

Finally, as a matter of actual fact, Excelsior's probability based analytic model cannot be reconciled with the facts of Basham or Lavender or Gallick.

3. RESPONDENTS' ATTEMPT TO RETRY THIS CASE IN THIS COURT.

Notwithstanding respondents do not challenge our statement (Petition, pp. 7-8) that Conrail's expert Shaw conceded on cross-examination that this accident could indeed have happened as petitioner claimed if a piece had broken off and jammed in the gears of the differential (Trial Tr., 863: "Yes inside of the axle if you had breakage of parts into the

gears [of the differential] that would cause a car to slow down."), both respondents continue, even in this Court, in effect, to retry this case, by relying on Shaw's testimony that this accident could not have happened as petitioner claimed. See Conrail's brief at pp. 5-6; Excelsior's brief at pp. 13-16.

The answers to this argument are clear: Even without Shaw's concessions on cross-examination, this jury would still have been entitled to reject Shaw's opinion and to credit petitioner's testimony. See Basham and Davis. In light of Shaw's concession that this accident could well have occurred as petitioner claimed, this case is in fact far stronger than was Basham. Under Basham and this Court's other decisions concerning the role of the jury in FELA cases, and on this record, this jury's resolution of this factual issue must be accepted.

For very much the same reasons, Excelsior's argument based on its reading of Mr. Kitka's testimony as evidencing that he had claimed to have physically inspected the emergency brake cable on this car (see Excelsior's brief at 14) is of no moment. As we read Kitka's testimony, he did not claim to have personally inspected this cable. But, even if his testimony should be so read, that still does not render the evidence supporting this jury finding of causation legally insufficient.

Whatever Kitka testified to, that testimony, like petitioner's, was before this jury. It was up to the jury to believe or disbelieve that testimony, to give it such weight as it deemed appropriate, to accept or reject it, in whole or in part. Whatever Kitka did with respect to inspecting this emergency brake cannot detract from the fact that

there was in this case entirely sufficient evidence on causation.

There is no justification for the respondents attempting to retry this case in this Court. They had their chance to persuade this jury that this accident did not occur as petitioner claimed. They failed. And they failed in the face of proof which was entirely sufficient to allow this jury reasonably to infer that Conrail had been negligent and that its negligence played at least some part ("any part"), see Rogers, 352 U.S., at 506, in causing this accident and petitioner's injury.

In its brief (at 21), Excelsior accuses petitioner of "seeking one further bite at the apple." This is ironic. In fact, it is Conrail which has been given a second bite at the apple. Having lost this case before the jury, it has been allowed to "retry" it in the New

York appellate courts. What respondents are here doing is nothing more than an attempt to continue that unauthorized and unlawful retrial, now before this Court.

4. THE IMPORTANCE OF THE QUESTIONS OF LAW HERE PRESENTED FOR REVIEW.

The significance of the issues of law presented by this case goes beyond the importance of this case to the parties. These issues go to the roles of the Congress and of this Court in our federal/state system and under our tri-partite system of government. They go to the role of the courts, including this Court, in seeing to it that effect is given to the will of Congress. See, e.g., Tennessee Valley Authority v. Hill, 437 U.S. 153, 194 (1978) (role of the courts is to enforce Congress' will); Atkins v. Kansas, 191 U.S. 207. 223 (1903) (public interests "imperatively demand" that legislative enactments be

recognized and enforced by the courts as embodying "the will of the people").

In fact, it is not even possible to consider this case solely in terms of petitioner's interest. Petitioner is a member of a class, a very large class, including not only railroad workers, but also Jones Act maritime workers. That class, all of its members, was intended by Congress to be benefitted and protected by these remedial statutes.

There is an identity between the interests of petitioner, and of this class of which he is a member, and the interests and intent of Congress. The petitioner's interest cannot be ignored without also ignoring Congress' intent.

This case presents what this Court has repeatedly recognized as an interest warranting the grant of review. See Rogers, 352 U.S., at 509:

> Cognizant of the duty to

> effectuate the intention of the Congress to secure the right to a jury determination [in FELA actions], this Court is vigilant to exercise its power of review in any case where it appears that the litigants have been improperly deprived of that determination.

See also Gallick, 372 U.S., at 109, and at 114 (discussing Tennant).

This case also warrants review based on this Court's responsibility under the Supremacy Clause to see to it that this federal statute is uniformly applied. See Brady v. Southern R. Co., 320 U.S. 476, 479 (1943).

Even if this case did not present the spectacle, noted by Judge Bellacosa (see A17-18), of now repeated defiance by the New York courts of this Court's clear teachings, it would still be a case calling for the grant of certiorari, based on this Court's responsibility to effectuate Congress' will concerning the

right to trial by jury in FELA cases and to assure that FELA litigants receive similar treatment in all states. Since this case does in fact also present a clear issue of apparently deliberate defiance by a state court of the constitutional authority of this Court and Congress, thus raising the most fundamental of Supremacy Clause issues, see Howlett v. Rose, 496 U.S. 356 (1990), it is plainly a case calling for review by this Court.

Beyond the above considerations, the New York Court of Appeals' decision in this case has the potential for causing delay and disruption in the courts, federal and state, by reason of the confusion it invites as to what is the standard of sufficiency of evidence in FELA and Jones Act cases.

Moreover, at least as long as this decision stands uncorrected, it will have

the practical effect of closing the New York state courts to many FELA and Jones Act plaintiffs. Indeed, as long as this decision is followed by the courts of New York, any plaintiff would be foolhardy to bring an even arguably close FELA or Jones Act case in the courts of that State. Compare O'Connell v. National R.R. Pas. Corp., 922 F.2d 1039 (2d Cir. 1991); Smith v. National R.R. Pas. Corp., 856 F.2d 467 (2d Cir. 1988).

Plainly, notwithstanding this Court's controlling precedents, one could not bring a Davis or Basham or Gallick or Webb or Lavender or Tennant type case in the New York courts if the instant decision were to be followed. All of those cases would have to be dismissed by the New York courts if the reasoning here of the New York appellate courts were to be followed.

5. BURDEN ON THIS COURT.

Excelsior's argument that review should be denied in this case in order not to unduly burden this Court (Brief at 19-21) is baseless. As Excelsior itself notes (id., 21), the views of Justices Frankfurter and Harlan on which it relies in making this argument were expressed in dissents, not opinions of this Court.

More to the point, even, the grant of review in this case would not impose any undue burden on this Court. Indeed, it is difficult to conceive how as a practical matter the grant of review in this case could impose any burden on this Court beyond that already imposed on the Court by reason of its having to determine this application for certiorari.

Essentially, this is the very simplest and most straightforward sufficiency of evidence case. It does not present any novel issue of law or fact.

There is no dispute that petitioner and his fellow officers testified as they did, or that Conrail's experts made the critical concessions we have noted concerning how this accident could have happened.

All this case involves is securing compliance with law already long-settled by this Court. The issues it presents are important. They are gravely important. But, in no way, we submit, is this a difficult case.

Indeed, should this Court grant certiorari, it could well be that the Court would decide that this case should be disposed of by a summary reversal, just as was done in Davis. See 379 U.S. 671. That could be done, in a manner fully consistent with this Court's roles as both declarer of what is the law and guardian of federal supremacy, by means of a summary order pursuant to Rule 16.1.

In such an order, this Court could point out that (i) under Basham and Lavender the evidence in this case was legally sufficient and (ii) the New York courts' reliance on Atchison, Topeka & Santa Fe R. Co. v. Toops, 281 U.S. 351 (1930), as authority for setting aside this jury verdict was misplaced.

In no event, however, would the grant of certiorari in this case unduly burden this Court. This is a specious argument. If the requisite number of members of this Court should agree with petitioner that this case presents issues warranting review by this Court, there is we submit, no reason why this Court should not grant review in this case.

Whether or not this was done intentionally, what was done in this case by the New York appellate courts stands in direct defiance of the intention of Congress and the authority of both that

body and this Court. Such defiance can not be allowed to stand uncorrected.

CONCLUSION

For the same reasons which impelled this Court to grant certiorari in, for example, Rogers, Davis, Basham, Webb, Lavender and Tennant, as well as for the other reasons set forth in this reply brief and in our petition, this Court should grant the writ of certiorari to review the decision and order of the New York Court of Appeals in this case.

Respectfully submitted,

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